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No. 20149

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH M. ARAGON,

Plaintiff and Appellant,

v.

R. A. WATHEN and C. A. YOUNG,

Defendants and Appellees.

Appeal from the United States District Court,
Southern District, Central Division

HONORABLE LEON R. YANKWICH, JUDGE

APPELLEES' BRIEF

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Attorneys for Appellees

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APPELLEES' BRIEF

JURISDICTIONAL STATEMENT

The United States District Court's jurisdiction to entertain plaintiff's complaint rested on 28 U.S.C. § 1343. This court has jurisdiction to review that court's order dismissing appellant's complaint. 28 U.S.C. §§ 1291, 1294.

STATEMENT OF THE CASE

In a complaint "OF CIVIL RIGHTS DEPRIVATION" filed February 4, 1965, in the United States District Court, Southern District of California, Central Division, plaintiff alleged he was deprived of the right to convert class E Government Bonds into cash "as a result of a wilful and felonious conspiracy by the said defendant's [sic], denying plaintiff his CIVIL RIGHTS which he is entitled to as an AMERICAN CITIZEN OF THE UNITED STATES" in violation

of 18 U.S.C. § 241. (Complaint p. 3.)

On February 10, 1965, in the United States District Court, Southern District of California, Central Division, the Honorable Leon R. Yankwich ordered appellant's complaint be dismissed on the ground it failed to show appellant was entitled to the relief sought. (Order Dismissing Complaint, p. 1.) The Court also stated:

> "The petitioner is held by virtue of process issued by a state court. We cannot in this proceeding review that judgment, which has become final." (Order Dismissing Complaint, p. 4.)

The Court also noted that according to its records appellant had been charged in a complaint with violation of the Fair Labor Standards Act. (Order Dismissing Complaint, p. 1.) Pursuant to that complaint, a stipulated judgment was entered into by appellant personally, and by his counsel, with the United States Department of Labor. (Order Dismissing Complaint, p. 2.) The Court noted, "In view of this broad stipulation the petitioner cannot be heard to say, as he does in this petition, that he was deprived of any rights." (Order Dismissing Complaint, pp. 3, 4.)

On March 22, 1965, in the United States District Court, Southern District of California, Central Division, the Honorable Leon R. Yankwich vacated the order of February 10, 1965, which dismissed the complaint, on

the ground that reference was made to a Fair Labor Standards case in which it was mistakenly believed appellant was a party. Thereupon the court entered an order dismissing appellant's complaint on the ground it failed to show appellant was entitled to the relief sought, stating:

> "The petitioner is held by virtue of process issued by a state court. We cannot in this proceeding review that judgment, which has become final."

On April 14, 1965, appellant filed a Notice of Appeal from the "judgment and order" of March 22, 1965.

STATEMENT OF FACTS

Testimony was not taken, the matter being decided on the pleadings.

SPECIFICATION OF ERROR

Appellant contends:

1. The District Court erred in "denying generally the allegations of the complaint."

2. The District Court had jurisdiction under 28 U.S.C. §§ 1343, 1331.

3. The District Court had jurisdiction under 42 U.S.C. §§ 1983, 1985.

SUMMARY OF APPELLEES' ARGUMENT

Appellant fails to state a claim upon which relief may be granted.

ARGUMENT

THE COMPLAINT WAS PROPERLY DISMISSED

Appellant does not state a claim upon which relief may be granted under 18 U.S.C. § 241. Pugliano v. Staziak, 231 F. Supp. 347, 349 (Footnote) (W.D. Pa. 1964).

While appellant does not mention any other sections of the Civil Rights Act in his complaint, in his Notice of Appeal he seeks to invoke these sections -- 28 U.S.C. §§ 1331, 1343; 42 U.S.C. §§ 1983, 1985. Even considering these sections, appellant has failed to state a claim upon which relief may be granted. He alleges he desired to convert a Government Bond in his possession to cash and was denied that right by prison authorities. Appellant has lost his civil rights by virtue of being sentenced to state prison. Calif. Pen. Code § 2600 et seq. In any event, matters of this character are questions of prison discipline which do not involve a federal question. Tabor v. Hardwick, 224 F. 2d 526, 529 (5th Cir. 1955); United States v. Ragen, 213 F. 2d 294, 295 (7th Cir. 1954); United States v. Radio Station WENR, 209 F. 2d 105, 107 (7th Cir. 1953); Curtis v. Jacques, 130 F. Supp. 920, 921 (Dist. Ct. Mich. 1954).

CONCLUSION

The trial court properly dismissed appellant's complaint. The order should be affirmed.

Respectfully submitted,

THOMAS C. LYNCH, Attorney General
WILLIAM E. JAMES,
Assistant Attorney General
DAVID S. SPERBER,
Deputy Attorney General

By DAVID S. SPERBER
DAVID S. SPERBER
Deputy Attorney General

Attorneys for Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those Rules.

DAVID S. SPERBER
DAVID S. SPERBER
Deputy Attorney General

DSS:bj
7/16/65
24 CR LA
65-488

No. 20148

In the

United States Court of Appeals

For the Ninth Circuit

OTTO H. LINSENMEYER,
Appellant,

vs.

MGM LABORATORIES, INC.,
Appellee.

Brief for Appellee

On Appeal from the United States District Court
for the District of Arizona

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Appellee.

Brief for Appellee

On Appeal from the United States District Court
for the District of Arizona

STATEMENT OF THE CASE

Prefatory Statement.

If is difficult to know where to begin answering a brief in which the only statement of fact is a cursory outline of the pleadings and procedure leading to a verdict for the Appellee, and in which, whatever facts are set forth, are thoroughly intermixed with argument. Those inconvenient facts upon which the District Court relied in arriving at its decision are entirely ignored.

Because Appellee is unable to accede either to the accuracy or the adequacy of Appellant's treatment of this

case, Appellee is obliged to submit the following detailed statement of the facts and evidence.

Detailed Statement of the Facts and Evidence.

1. RELATIONSHIP BETWEEN OTTO LINSENMEYER AND DAVID L. JOHNSON.

Sometime during the year 1960, the appellant Otto Linsenmeyer (hereinafter called Linsenmeyer), an attorney and an investor (T.P. 365) began to do legal work for David L. Johnson (hereinafter called Johnson) (T.P. 383). Beginning in 1961 and continuing into 1962 numerous personal loans between the two men occurred. These consisted of substantial sums, with Johnson, at one time lending to Linsenmeyer $50,000.00 and Linsenmeyer lending up to $10,000.00 to Johnson (T.P. 532-533). These transactions were made and based upon friendship, the loans bearing no interest, carrying no security and often, not even represented by a promissory note (T.P. 533).

2. CORPORATE VENTURES OF OTTO LINSENMEYER AND DAVID L. JOHNSON.

Four Arizona corporations were organized within a seven-month period beginning in July of 1961. Linsenmeyer acted as attorney in the formation of all four (T.P. 365, 370).

(i) **Acme Rental and Supply Co.** (hereinafter called Acme):

This corporation was organized in August of 1961 (R.A. Docket No. 8, page 2) with Linsenmeyer and Johnson as two of the three incorporators. Each of them owned two hundred fifty shares of capital stock (R.A. Docket No. 8, page 2).

(ii) **AllState Materials Co.** (hereinafter called AllState):

This company was organized in January of 1962 with Linsenmeyer and Johnson as sole incorporators. Each

owned fifty percent stock interest and each was an officer and director (R.A. Docket No. 8, page 2).

(iii) **City Developers Supply Co.** (hereinafter called City Developers):

This company was organized in September of 1961 but was renamed City Developers in February of 1962. Linsenmeyer and Johnson were two of the three incorporators and each owned a fifty percent stock interest in the company and was an officer and director (R.A. Docket No. 8, pages 2 & 3).

(iv) **Producers International Pictures, Inc.** (hereinafter called PIP):

This company was organized in July of 1961 (T.P. 148), the purpose of the company being to acquire and distribute motion pictures. Johnson was one of the incorporators and President as well as a director (R.A. Docket No. 8, page 3). On February 16, 1962, Linsenmeyer became Secretary-Treasurer and a director of the company (Plaintiff's Exhibits 10 & 11 in evidence), and was given orally by Johnson, the President and sole stockholder (T.P. 371, 372) a twenty-seven and one-half percent stock interest in the company (T.P. 376-377).

3. LACK OF SEPARATE AND DISTINCT CORPORATE IDENTITY.

There was only one thing that the four companies had that enabled them to be called corporations—certificates of incorporation (T.P. 368).

(i) **By-Laws:** None of the corporations had By-Laws (T.P. 368).

(ii) **Stock Books:** None of these corporations had a stock book (T.P. 367, 371).

(iii) **Minute Books:** None of these corporations had a minute book (T.P. 367, 372).

(iv) **Income Tax Returns:** Up until ninety days prior to the trial, no corporate income tax returns had ever been prepared (T.P. 367, 368).

(v) **Business Addresses:** Acme, AllState and City Developers used one and the same address in Phoenix, Arizona (T.P. 368).

(vi) **Shares of Stock and Capitalization:** In none of the corporations (T.P. 534) except PIP was any stock ever issued to a stockholder. In PIP there were only one hundred shares of stock issued with a par value of $10.00 per share for a capitalization of only $1,000.00 (T.P. 371, 372).

(vii) **Bank Accounts:** All four of the corporations opened bank accounts at approximately the same time, in the same branch of the First National Bank of Arizona (T.P. 100, 101).

4. OPERATION AND MANAGEMENT OF THE COMPANIES.

A. PIP.

(i) **Formation.**

In the spring of 1961 William Hunter (hereinafter called Hunter) met Johnson (T.P. 147). At this time Hunter was in the motion picture distribution business (T.P. 147). Discussions concerning the formation of a motion picture distribution company took place between Hunter, Johnson and Linsenmeyer in Phoenix, Arizona (T.P. 148), at Linsenmeyer's office (T.P. 149). Neither Linsenmeyer nor Johnson had any experience in the motion picture business (T.P. 149, 150; 526, 527) and Johnson and Linsenmeyer associated with Hunter because of his experience in that field (T.P. 150).

After the formation of the corporation in July of 1961, Hunter was made a Vice President (T.P. 151) and was left

on his own due to his knowledge of the film business. He began acquiring motion picture films and undertook to have signed franchise contracts for their distribution with distributors all over the country (T.P. 151, 152).

Hunter's initial activities on behalf of the company were known to Linsenmeyer in the summer, fall and winter of 1961, prior to the time when Linsenmeyer became an officer and director of PIP (T.P. 154, 156).

(ii) **Linsenmeyer's Participation in Activities of PIP.**

In the spring of 1962 in order to make prints from the films which Hunter had acquired for PIP, Hunter executed a contract with MGM Laboratories, Inc. (hereinafter called MGM), the Appellee herein (T.P. 47). During all the time that Hunter was dealing with MGM on behalf of PIP Linsenmeyer was fully informed and aware of what was going on (T.P. 180-183).

The indebtedness incurred by PIP to MGM for the printing of motion picture film was known to Linsenmeyer both during the time that MGM was doing the laboratory work in making the motion picture prints and after the work was completed (T.P. 185).

In the spring of 1962, PIP borrowed $80,000.00 from the First National Bank of Arizona (Plaintiff's Exhibits 15, 16 & 17 in evidence). This loan was negotiated by Linsenmeyer (T.P. 115, 388). Linsenmeyer obtained as an endorser on the note his sister, Irma Linsenmeyer (T.P. 261, 391). This loan was to be used to pay for the two motion pictures that Hunter had acquired in Europe, "The Huns" and "The Centurians" (T.P. 114, 154, 155).

(iii) **Income to PIP.**

In the summer and fall of 1962 monies came into PIP from the distribution of the prints made by MGM (T.P. 189).

$56,087.20 came into PIP from the Army and the Navy (T.P. 582). This was the only real income ever earned by PIP (T.P. 285). The money came into the company between August 17 and October 15, 1962 (T.P. 583).

(iv) **Monies Out of PIP.**

Between February and October of 1962, monies in excess of $56,000.00 were paid out of PIP to, among others, Linsenmeyer and Johnson and to Acme, AllState and City Developers (Plaintiff's Exhibit 27 in evidence). These monies went not only to the companies but to the Johnson and Linsenmeyer Account.

B. BANK ACCOUNTS, THEIR TREATMENT AND OPERATION.

The Maryvale Branch of the First National Bank of Arizona was the depository of the accounts of Acme, AllState, City Developers and PIP (T.P. 100, 101). On the accounts of Acme, AllState and City Developers, Johnson and Linsenmeyer could sign checks (T.P. 102).

In addition to the corporate accounts there existed an account at the same branch, known as the Johnson and Linsenmeyer Investment Account (hereinafter called Johnson and Linsenmeyer Account). This was a joint tenancy account with the right of survivorship (T.P. 101). Either Johnson or Linsenmeyer could sign checks on this account (T.P. 102).

(i) **Inter-Account Transfers and Transactions.**

There existed at the Maryvale Branch of the First National Bank of Arizona a method or procedure whereby interbank transfers could occur between accounts at the same branch. These transfers were handled in a manner known as "Advice of Charge" slips (T.P. 105, Plaintiff's Exhibits 24, 25 & 27 in evidence). This method was used, instead of and in addition to the drawing and depositing

of checks. Monies were thus moved back and forth between the four corporate accounts and the Johnson and Linsenmeyer Account (T.P. 104, 104). Most of the transfers of monies between and among these five accounts took place by inter-bank transfers using "Advice of Charge" slips (T.P. 105).

The transfers would occur when one account had insufficient funds so that a transfer of money from an account which had adequate funds was needed to make up any deficit (T.P. 107).

The bank made such transfers on verbal requests from both Johnson and Linsenmeyer (T.P. 107, 425). Money was transferred in this way from, to and between all four corporate accounts and the Johnson and Linsenmeyer Account (T.P. 104, 105, 310, 311).

Monies from PIP went to the accounts of AllState, Acme and City Developers (T.P. 579), without the formality of writing a check. Monies from Acme, City Developers and AllState went into the Johnson and Linsenmeyer Account (T.P. 112, 113, Plaintiff's Exhibit 27 in evidence), without the formality of writing a check. Substantial amounts were thus transferred into the Johnson and Linsenmeyer Account from Acme, AllState and City Developers, which companies obtained monies from PIP (T.P. 580-581).

There did not exist one corporate resolution in any of the four corporations authorizing such transfers of funds as had been taking place within the Maryvale Branch of the First National Bank (T.P. 104, 421, 422, 423, 426).

THE COURT'S OPINION

The trial judge on the day he rendered his decision stated from the bench some of his reasons, as follows:

"So the question arises as to whether or not this Court should or should not, as we call it, pierce the corporate veil.

I will not pierce the corporate veil of PIP for the entire amount owing to MGM, because there is virtually nothing to indicate that when the MGM-PIP contract was entered into there was any financial manipulation of the PIP account by or among the corporate or individual defendants.

However, this does not dispose of the case.

There is a different question arises when we consider the treatment of the receipts of PIP.

In February 1962 Mr. Linsenmeyer became secretary-treasurer of that company, and a member of its Board. Either then or some time thereafter it was agreed that he would become the owner of a percentage of the stock of that company.

At this time, that is, in February of 1962, he and Mr. Johnson were fifty-fifty, 50 per cent owners of the stock of the defendant corporations other than PIP, and had equal rights in Johnson and Linsenmeyer partnership.

Then, that is, after February, 1962, began the use of so-called Advice-of-Charge transactions, which became very active in July, August, and September, 1962.

To say that these Advice-of-Charge memos were an unusual way of doing business is putting it mildly. And to say that the action of the bank in recognizing them without any written corporate resolutions was so unusual, to put it mildly.

In August, September, and October, 1962, payments from the Army and Navy to PIP were made aggregating $56,087.20. The amounts so received by PIP were paid out largely by the Advice-of-Charge procedure, that is, the receipts were treated as property of the corporation, and/or the individual and corporate defendants.

Perhaps there were *inter partes* loans of one sort or another by the defendants, but in any event the transactions were so mixed that they were as one with Johnson and Linsenmeyer; and it takes no speculation, but just plain common sense to hold that all investments were treated as for the benefit of Johnson and Linsenmeyer.

And thus we may conclude that at least insofar as the Army and Navy payments are concerned, it is clear that the corporate veil or veils may be pierced.

It clearly appears that the Army and Navy monies belonged to the creditors of PIP. Any monies advanced by the corporations, other than PIP, or Johnson-Linsenmeyer, should be treated as investments in PIP, rather than loans, certainly insofar as the creditors of PIP are concerned.

As the only creditor before the Court in this proceeding is the plaintiff, I award judgment in favor of MGM in the amount of the Army and Navy payments, namely, $56,087.20, against all the defendants other than PIP.

To recapitulate: As I indicated, the free-wheeling operation of PIP occurred mainly during the period of July through September or October, 1962, a considerable time after the formation of the contract between the MGM and PIP.

During this period, and to a lesser extent at other times, the individual defendants were transferring their money back and forth in an attempt to keep their various corporations alive.

This may not have been fraudulent. However, I do not mean to condone such activity.

MGM was an existing, legitimate creditor prior to PIP's receipt of the Army and Navy contract payment, which was the only income of any consequence received by PIP.

To allow withdrawals of this income by the defendants would result in the enrichment, the unjust enrich-

ment of the individual and corporate defendants other than PIP.

Even if there were withdrawals, even if these withdrawals are considered loan repayments, they cannot under the circumstances of this case take precedence over the proved debt owing to a *bona fide* creditor, which of course MGM was." (T.P. 641, line 14-644, line 11).

Thereafter, Findings of Fact were made (R.A. Docket No. 16). The Court found as facts, among other things, the following:

"6. The corporate defendants All State Materials Co., Inc. and City Developers Supply Co. were equally owned by the individual defendants, Otto Linsenmeyer and David L. Johnson. The corporate defendant Acme Rentals and Supply Co. had outstanding stock in the amount of 250 shares owned by David L. Johnson and 500 shares owned by Otto Linsenmeyer. In none of the three corporations was any stock ever issued or delivered to the individual defendants, who were also officers and directors of these corporations. Producers International Pictures, Inc. had as its President, David L. Johnson and, since February, 1962, as its Secretary-Treasurer, Otto Linsenmeyer. Both of these men were President and Secretary-Treasurer thereof respectively. All stock in Producers International Pictures, Inc. was owned by David L. Johnson, however Otto Linsenmeyer had a right or option to purchase 27½% of the stock owned by David L. Johnson.

7. All corporate defendants had their business checking accounts in the Maryvale Branch of the First National Bank of Arizona, and in addition thereto, Johnson and Linsenmeyer had an individual personal joint tenancy account, with the right of survivorship, at said bank and branch. David L. Johnson had his personal account at said branch also.

8. All the corporations were either organized by the individual defendants or operated by them as their alter ego.

9. None of the corporate defendants had any genuine or separate corporate existence, no separate phone listings, no by-laws or stock book, no minute book, or any other indicia of corporate management was ever in existence. All corporate defendants here were used for the purpose of permitting Otto Linsenmeyer and David L. Johnson to transact their individual businesses under a corporate guise." (R.A. Docket No. 16, page 1, line 27-page 2, line 20.)

"12. Into the Johnson-Linsenmeyer Investment Account at the First National Bank of Arizona, Marysville Branch, were deposited funds from all the corporate defendants and that from the Johnson-Linsenmeyer Investment Account varying sums of money went into all the corporate defendants' accounts.

13. No corporate resolutions ever existed showing any authority in any of the corporations to either lend money to or borrow money from Otto Linsenmeyer and/or David L. Johnson personally or to lend to or borrow from any of the corporate defendants.

14. First National Bank of Arizona, Maryvale Branch, made inter-corporate transfers among and between all the corporate defendants, as well as between these accounts and the Johnson-Linsenmeyer Investment Account and the Otto Linsenmeyer and David L. Johnson personal checking accounts. These inter-corporate and inter-personal account transfers were made by the bank by what was known as "advice of charge slips". These inter-corporate and inter-personal account transfers were made by the First National Bank of Arizona, Maryvale Branch, whenever one of the corporate accounts or personal accounts of the individual defendants had insufficient funds, said transfers being made from one or more of the concerned accounts with sufficient funds.

15. From all the corporate accounts were transferred substantial amounts of cash directly to the individual defendants, David L. Johnson and Otto Linsenmeyer or paid out for their benefit.

16. No corporate authority whatsoever existed in any of the defendant corporations authorizing said inter-corporate transfers of funds as took place and were handled by the First National Bank of Arizona, Maryvale Branch.

17. Between February and November, 1962, over $185,000.00 was deposited into the Johnson-Linsenmeyer Investment Account, among other sources, Otto Linsenmeyer, David L. Johnson, Producers International Pictures, Inc., All State Materials, Acme Rental and Supply Company and City Developers.

18. From August, 1961 through October, 1962, over $138,000.00 was deposited into the bank account of Producers International Pictures, Inc.

19. During the months of June through September, 1962, there was deposited $56,087.20 into the Producers International Pictures, Inc. account, representing monies paid to the corporation from the Army and Navy for acquisition or rental of two motion picture films to be distributed by Producers International Pictures, Inc.

20. Between February 1962 and October, 1962, there was paid out of Producers International Pictures, Inc., either directly to the defendants Otto Linsenmeyer and David L. Johnson or to other corporations in which they were officers, directors, stockholders, monies in excess of $56,000.00 and monies were also paid out of Producers International Pictures, Inc. account into the Johnson-Linsenmeyer Investment Account and from there distributed to other payees in which and with which the individual defendants, David L. Johnson and Otto Linsenmeyer had private business dealings.

21. For all of these transfers out of Producers International Pictures, Inc. to David L. Johnson and/or Otto Linsenmeyer, or any of the corporations that they controlled, there were no corporate resolutions or other authorizations warranting or authorizing such transfers or said withdrawals of monies." (R.A. Docket No. 16, page 3, line 1-page 4, line 15)

SOLE QUESTION PRESENTED

Whether the evidence is sufficient to support the findings of the lower Court that the defendant corporations had no genuine or separate corporate existence and were thus used as the alter ego of Otto Linsenmeyer, permitting him to transact his individual business under a corporate guise?

SUMMARY OF ARGUMENT

1. Appellant is not entitled to run, manage and control corporate entities as an adjunct of his personal business operations, investments and manipulations without incurring personal and individual liability for the actions so undertaken, and the debts incurred.

2. The corporate substance must be examined and not the mere form.

3. Appellant is not entitled to the protection usually afforded by the corporate way of doing business, for the following reasons:

(a) Not even a pretense was made by the Appellant to maintain the semblance of separate and distinct corporate entities.

(b) None of the corporations had By-Laws, minute books, stock books, adequate, if any, capitalization or issued stock.

(c) No board meetings, no stockholders meetings and no resolutions therefrom existed, permitting, allowing or authorizing inter-corporate transfers of money between all four corporate accounts and the Johnson-Linsenmeyer Investment Account.

4. Linsenmeyer, as an officer, director and stockholder in all four companies, as well as a signatory on the Johnson-Linsenmeyer joint tenancy Investment Account knew all

about the financial doings of the companies and the monies going into and flowing from the Johnson-Linsenmeyer Account. He personally received money from all of the companies, through the conduit of the Johnson-Linsenmeyer Account, monies having flowed directly into this account from the four corporations and paid out either to Appellant or for his benefit.

ARGUMENT

I. Preliminary

The judgment of the District Court should be affirmed on the sole ground that Appellant's argument is nothing more than a plea for this Court to re-weigh and re-evaluate the evidence before the trial Court and rewrite its Findings of Fact.

It should be unnecessary to engage in an extended discussion on the established rule that the Findings of Fact of a District Court may not be set aside unless clearly erroneous. In *Darter v. Greenville Community Hotel Corporation,* 301 F.2d 70 (C.A. 4th, 1962), it was clearly held that unless unsupported by substantial evidence, findings of fact of a District Court may not be set aside.

Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C. in pertinent part provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge of the credibility of the witnesses."

The United States Supreme Court further refined the standard in *United States v. United States Gypsum Co.,* 333 U.S. 364, 68 S.Ct. 525, (1948), when it stated:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Id. 395, 68 S.Ct. 542. In this connection see also *Olympic Finance Co. v. Thyret,* 337 F.2d 62 (C.A. 9th, 1964).

The Appellant has not specifically related the Findings of Fact to his argument, nor has he pointed out with any particularity whatsoever where the findings of the trial Court are clearly erroneous, which here is his burden. *Glens Falls Indemnity Company v. United States,* 229 F.2d 360, 373 (C.A. 9th, 1956). All the Appellant has done is to make a bald assertion that the trial Court erred in finding the fact that the defendant corporations were an alter ego of the Appellant (Appellant's Opening Brief, page 6).

II. District Court Properly Found That the Defendant Corporations Were the Alter Ego of the Appellant

DISREGARDING THE CORPORATE ENTITY

Ordinarily, a corporation is treated as a legal entity, separate and distinct in identity from the members who comprise it. 18 C.J.S. Corporations, § 4, p. 368.

Apart from constitutional, statutory, or charter provisions, the directors and officers of a corporation are not, as such usually, personally liable for the corporation's debts. 19 C.J.S. Corporations, § 839, p. 262.

However, where the director or officer is the alter ego of the corporation, that is, where there is such unity of interests and ownership that the separateness of the individual and corporation has ceased to exist, and the facts are such that such an adherence to the fiction of separate existence of the corporation would sanction a fraud or promote injustice, such director or officer will be held liable for obligations of the corporation.

In the leading Arizona case of *Employers Liability Assurance Corporation v. Lund,* 82 Ariz. 320, 313 P.2d 393 (1957), the Court laid down the rules pertaining to the cir-

cumstances necessary if the corporate veil is to be pierced. In this case, the Appellants were engaged in the business of marketing farm products, both as an individual, and in a partnership with others. In the winter of 1950 a marketing company was organized and this company continued until its affairs were terminated by insolvency in the fall of 1951. In this company the Appellant, his wife and his son owned all but one share of stock. The three family members were the principal officers, directors and stockholders of the corporation. The Court found that they controlled the corporation's assets and its operations. The Court also found that the business engaged in by the corporation was the same business that the individual father had engaged in prior to the incorporation. Its area of operation, the office location, office equipment, post office address and telephone number were identical. The Court in this case found that the family was the alter ego of the corporation. The Court said:

> "The corporation fiction will, however, be disregarded upon the concurrence of two circumstances; that is, when the corporation is, in fact, the alter ego of one or a few individuals and when the observance of the corporate form would sanction a fraud or promote injustice. *Whipple v. Industrial Commission,* 59 Ariz. 1, 121 P.2d 876; *Walker v. Southwest Mines Development Co.,* 52 Ariz. 403, 81 P.2d 90; *Gonzales & Co., Brokers v. Thomas,* 42 Ariz. 308, 25 P.2d 552; *Mosher v. Lee,* 32 Ariz. 560, 261 P.35; *Phoenix Safety Investment Co. v. James,* 28 Ariz. 514, 237 P. 958; *Brice v. Sanger Bros.,* 28 Ariz. 15, 229 P. 397. The disregard of the corporate fiction has not been limited to instances where the incorporation is for fraudulent purposes, but may be observed if after organization the corporation is employed for fraudulent purposes. *Stark v. Coker,* 20 Cal.2d 39, 129 P.2d 390; *Advertects, Inc. v. Sawyer*

Industries, Fla., 84 So.2d 21; *Whitney v. Leighton*, 225 Minn. 1, 30 N.W.2d 329." (82 Ariz. 323, 324)

"In this jurisdiction it is settled that a fraud may be perpetrated by the giving of a promise to perform a future act made with the present intention not to perform. *Waddell v. White*, 56 Ariz. 420, 108 P.2d 565; *Law v. Sidney*, 47 Ariz. 1, 53 P.2d 64. It also seems to be accepted that a buyer's nondisclosure of insolvency constitutes a fraud where it is coupled with an intent not to pay for the goods." (82 Ariz. 324, 325)

The *Lund* case evolved from a long line of Arizona decisions which historically up to the present time have defined and laid the groundwork for the occasions when the corporate veil may be pierced.

In the case of *Whipple v. Industrial Commission*, 59 Ariz. 1, 121 P.2d 876 (1942), the Court stated that questions about piercing the corporate veil had been presented to it on many prior occasions. The Court in this case tended to synthesize the law in Arizona pertaining to this subject. The facts were simple. The Appellants were the operators of a sawmill and an employee of the sawmill was injured while working for the corporation. The Industrial Commission of the State of Arizona felt that the company was merely the alter ego or cloak of Whipple, who organized the company for the express purpose of permitting engagement in the sawmilling business without any personal liability for injuries to employees under the Compensation Act. The Court in this case said:

"A corporation is merely a legal fiction created for the convenience of conducting business, the true human entity behind it being the stockholders who, in reality, own it and all its property, though the legal title may stand in the name of the corporation. It is well settled as a general rule that when this fiction of the law is urged and carried on for an intent not within the reason and the purpose for which it is allowed by the

law, the form should be disregarded and the corporation should be considered merely as an individual or an aggregation of persons both in equity and law. 18 C.J.S., Corporations, p. 376, § 6.

We have had questions like this before us on a number of occasions and have always followed the above rule. In the case of *Phoenix Safety Inv. Co. v. James,* 28 Ariz. 514, 237 P. 958, 959, the Court said:

'The Courts will disregard corporate form when justice requires it to look to the substance and not to the shadow (citing cases).

The language of the Court in *Minifie v. Rowley,* 187 Cal. 481, 303 P. 673, is apt:

'"Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherance to the fiction of the separate existence of the corporation would under the particular circumstances, sanction a fraud or promote an injustice."'

While most of the cases on this subject deal with the rights of creditors, we see no reason why the principle does not apply equally in any other case where justice requires it.'

The same question arose in *Mosher v. Lee,* 32 Ariz. 560, 261 P. 35, and we held that the corporation referred to therein was merely a corporate form through which an individual could handle certain business, and we disregarded the form and held the individual responsible."

(a) Control

There can be no doubt that Linsenmeyer was a stockholder in PIP as he was in the three other corporations. From his own testimony (T.P. 376) this is patent. He cannot be permitted to say that he was not a stockholder in PIP because no stock was ever received by him, since he acknowledges that he was a stockholder in the three other companies though no other stock was ever issued by them either (R.A. Docket No. 8; T.P. 534).

In all four corporations Linsenmeyer was an officer and director as well as the companies' attorney (T.P. 365, 370; R.A. Docket No. 8; Plaintiff's Exhibits 10 & 11 in evidence).

It can, therefore, be seen that Linsenmeyer along with his partner, Johnson, were the sole controlling influences over the companies.

(b) Lack of Individuality

These four companies were so identified with Linsenmeyer and his partner, Johnson, that both men completely ignored maintaining any semblance of a distinct separateness between the companies. For not one of the companies were there even form By-Laws (T.P. 368). Aside from the minutes in evidence (Plaintiff's Exhibits 10 & 11 in evidence), no other minutes for any of the companies existed, or, at least, were ever produced by the Defendants during the trial. There was not maintained a minute book for any company (T.P. 367, 372), nor was there a stock book for any company (T.P. 367, 371). No corporate income tax returns were regularly or timely filed (T.P. 367, 368).

Most indicative of all is the almost total lack of capitalization in any of the corporations. Only in PIP was stock ever issued, $1,000.00 worth (T.P. 371, 372). In one California case, *Minton v. Cavaney,* 15 Cal. 641, 364 P.2d 473

(1961), the Court held that equitable owners were personally liable because they treated the corporate assets as their own, added and withdrew money at will and initially provided inadequate capitalization. How well this applies to the case before the Court.

(c) Unity of Interest and Ownership

The oneness of Linsenmeyer and his companies can best and most clearly be seen by the manipulation of the corporate bank accounts and the Johnson-Linsenmeyer Account (Plaintiff's Exhibit 29 in evidence).

During the whole trial, Linsenmeyer maintained that any money put into any of the corporations were loans. His own accountant, Mr. Brown, treated them as such—but only because it was convenient (T.P. 284, 285). Linsenmeyer thusly maintained that monies paid out by these companies to any of the other companies or to Johnson, Linsenmeyer or to their joint account, were repayments of such purported loans (T.P. 450). Yet, both the documentary evidence in the form of corporate and individual financial statements (Plaintiff's Exhibits 1, 1A, 2, 3, 4, 5, 6 & 7 in evidence) and the lack of any corporate resolutions permitting such dealings, prove conclusively that these monies were not loans by the broadest stretch of the imagination. They were merely personal and private monetary transfers and manipulations by Linsenmeyer and Johnson.

During the trial the following exchange occurred, Linsenmeyer was testifying:

> "Q. Using the Johnson-Linsenmeyer account as an entity, any monies that came into it from these four corporations, is it your testimony that these were in repayment of loans made by that entity to either or any of those four corporations?

A. Yes. Of the separate monies in the account belonging to the individuals Johnson or Linsenmeyer.

Q. Is there any evidence in any of the corporations either in your possession or Mr. Johnson's possession evidencing such loans in the forms of notes, bonds, or other indicia of debt?

A. Due those four corporations?

Q. That is right.

A. I don't think there was any evidences.

Q. Were these loans interest-bearing?

A. No.

Q. Were these loans secured by any security?

A. No.

Q. You are aware, to use your gesture, Mr. Linsenmeyer, meaning the circuity of money flowing, that monies did flow not only from the corporations into Johnson-Linsenmeyer, but between the corporations themselves, inter-bank transfers. You are aware of that?

A. Yes, I am aware of that fully.

Q. Now, are there any notes in the corporations, or bonds, or other indications of loans that these corporations have indicating borrowing between them?

A. No, just ledger entry.

Q. Just ledger entries?

A. Yes.

Q. Denominated Loans?

A. Yes.

Q. By Mr. Brown?

A. By Mr. Brown, and also by the CPA's Racey & Associates, and approved by the U. S. Director of Internal Revenue.

Q. Were these inter-corporate exchanges of monies which you are claiming are loans, were these interest-bearing when money went from All State to Acme, or from PIP to City Developers?

A. No.

Q. Not interest-bearing?

A. No, sir.

Q. Non-secured?

A. Well, I think they were secured good enough for Mr. Johnson and myself, because we owned all the outstanding stock in the Acme, All State, and City Developers ultimately.

Q. That is exactly what I am driving at, Mr. Linsenmeyer. You and Mr. Johnson were your own security, and your own entity, isn't that correct?

A. No. No, I wouldn't say that we were alto ego of the corporations, but we used those funds between corporations as they were required to be used, just like if we went to the bank and borrowed the money, we didn't have to give the bank the resolution every time we borrowed any money." (R.T. 450, line 9 through 452, line 13)

The financial dealings by Linsenmeyer and the companies were such that the trial judge, the Honorable Walter M. Bastion, was able to say:

"To say that these Advice-of-Charge memos were an unusual way of doing business is putting it mildly. And to say that the action of the bank in recognizing them without any written corporate resolutions were also unusual, to put it mildly." (T.P. 642)

(d) Injustice Amounting to Fraud to Adhere to Corporate Fiction

From Plaintiff's Exhibits 28 and 29 in evidence, there can clearly be seen that the amount of money that went into and out of PIP and the Johnson-Linsenmeyer Account was substantial. From Plaintiff's Exhibit 27 in evidence and the testimony of Mr. Nevlin can be determined the passage of money from PIP to the other three corporations and from these three corporations, to-wit, Acme, All State and City Developers, there passed into the Johnson-Linsenmeyer Account substantial sums (T.P. 104, 105; 310, 311; 579; 112, 113; 580-581).

In a period of a few months somewhere between $185,000.00 and $220,000.00 went through the Johnson-Linsenmeyer Account (T.P. 576; Plaintiff's Exhibit 29 in evidence).

The Army and Navy money of over $56,000.00 went into and out of PIP between August 17 and October 31, 1962, when the PIP bank account was, for all practical purposes, closed (T.P. 583; Plaintiff's Exhibit 28 in evidence).

This PIP money went to the three other corporations and therefrom into the Johnson-Linsenmeyer Account. Most all of these monies were transferred by "Advice of Charge" slips, inter-bank handling (T.P. 584).

All these transactions took place after the legitimate indebtedness to MGM had been incurred and known to the principals involved (T.P. 182, 183, 185).

CONCLUSION

In the above analysis of the facts, the evidence and the law is demonstrated that the Appellant and his corporations were one and the same. No amount of verbage or obfuscation can change that. The Judgment of the District Court should be affirmed.

Respectfully submitted,

SHELDON MITCHELL
Attorney for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

SHELDON MITCHELL

No. 20146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRASWELL MOTOR FREIGHT LINES, INC.,

Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.,*

Appellees.

APPELLEES' BRIEF.

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Appellees.

APPELLEES' BRIEF.

Statement of the Case.

The appellant Braswell Motor Freight Lines, Inc. (the Employer) is an employer in an industry affecting commerce within the meaning of the Labor Management Relations Act (the LMRA) [R. 320, ¶2], and the appellees Western Conference of Teamsters, and Local Unions 208, 224, 357 and 495, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Unions) are each labor organizations within the meaning of the LMRA [R. 320, ¶3].[1]

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[1]Although there were other defendants sued, including the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the action was dismissed at the time of trial as to all defendants other than the appellees [R. 319-20, ¶32].

As a member of the California Trucking Association [R. 75, ¶7], the Employer was party to a collective bargaining agreement entitled "Western States Area Master Freight Agreement" [*ibid.*] (the Master Agreement), as well as party to certain agreements supplemental thereto [R. 75-76, ¶8]. These agreements encompass employers and unions in eleven western states of the United States [R. 84].

Commencing on June 11, 1962, some of the Employer's workers represented by the Unions engaged in a strike over what they believed were unfair labor practices being engaged in by the Employer in another of its operations [R. 78, ¶20], and concerning which, charges had been filed against the Employer with the National Labor Relations Board (the Board) [R. 77, ¶18]. The strike lasted from June 11, 1962 through April 1, 1963, and during this period the Employer replaced the striking workers with other employees [R. 79-80, ¶¶26-29]. On behalf of the replaced workers, grievances were filed by the Unions, seeking their reinstatement and the restoration to them of seniority rights [R. 80-81, ¶33]. These grievances alleged that the Employer's refusal to reinstate the striking employees with seniority rights constituted a violation of article 6, section 1, and article 10, section B-1 of the Master Agreement [*ibid.*].

Pursuant to article 8, section 1 of the Master Agreement, there are created a number of "Joint Area Committees" for different geographical areas covered by the Master Agreement [R. 88]. These Committees are composed of equal numbers of employer and union representatives who hear and resolve disputes arising between parties to the Master Agreement [*ibid.*] in ac-

cordance with the procedures set forth in article 9 [R. 89].[2]

A similarly constituted body, called the "Joint Western Committee," is created by section 2 of article 8 [R. 88]. The function of this Committee is to act as an appellate board for matters that cannot be decided by the various Joint Area Committees [R. 89, art. 9, §1(a)]. It also has the power, if the members of the Joint Western Committee unanimously so decide, to review cases that have been resolved by a Joint Area Committee. And it is the Joint Western Committee which is charged with the responsibility, at the request of either the Union or Employer Area Secretary, of deciding all matters pertaining to the interpretation of the parties' collective bargaining agreements [*id.*, §1(d)].

The grievances initiated by the Unions in this case were filed with the Southern California Area Joint Committee [R. 80-81, ¶33]. At a hearing held by this Committee, the Employer entered a special appearance for the purpose of contesting that Committee's jurisdiction to hear the dispute [R. 81, ¶34(a)]. The Employer's procedural challenge to the Committee's jurisdiction was ruled upon adversely to the Employer [R. 161, lines 23-26]; however, the Joint Area Committee deadlocked on the merits of the dispute [R. 189, line 21, to R. 193, line 4]. The deadlocked grievances were then referred by the Union Secretary of the Joint Area Committee to the Joint Western Committee [R. 82, ¶34(c)] pursuant to article 9, section 1(d) of the Master Agreement [R. 89].

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[2]These Committees are, pursuant to the holding of *General Drivers Union v. Riss & Co.*, 372 U.S. 517 (1963), capable of rendering an enforceable arbitration award.

The Joint Western Committee ruled that the hearing on the merits be postponed pending the decision of the National Labor Relations Board in the case then pending against the Employer [R. 196, line 25, to 197, line 7; R. 198, lines 18-27].

As noted in the Employer's brief, the Board has now rendered its decision (see Op. Br. of Appellant at 4, n.4), in which it found the Employer to have committed unfair labor practices within the meaning of sections 8(a)(1) and 8(a)(5) of the LMRA [29 U.S.C. §§158(a)(1), 158(a)(5)].

Braswell Motor Freight Lines, Inc., 154 N.L.R.B. No. 20, 59 L.R.R.M. 1711 (July 30, 1965).

The Employer sought in the district court, to have the arbitration before the Joint Committees enjoined from proceeding [R. 10, ¶¶3, 4]. That court ruled that the Unions' grievances were arbitrable, and the court refused the Employer any relief [R. 321-22 ¶¶9, 10]. This appeal then followed.

ARGUMENT.

Three major premises underlie each of the arguments advanced by the Employer. One is that the grievance procedure involved in this case does not result in a final adjustment, and therefore, that the ordinary rules relating to arbitrability under section 301(a) of the LMRA are inapplicable. Second, that an arbitrator may not resolve a contract dispute if the conduct of one of the parties arguably constitutes an unfair labor practice. And third, that certain language of the parties' contract precludes the Unions' grievances from being processed.

These arguments shall be examined in order and shall be shown to be baseless.

A. WHETHER THE PARTIES' CONTRACT RESULTS IN A FINAL AND BINDING ARBITRATION AWARD IS NOT RELEVANT TO A DETERMINATION IN THIS CASE, BUT EVEN IF IT IS RELEVANT, THE PARTIES' PROCEDURE DOES IN FACT RESULT IN A FINAL AND BINDING DECISION.

The Employer argues that the grievance procedure in the parties' collective bargaining agreement does not provide for a final and binding decision, and that as a result, "the rule of liberal interpretation of true arbitration provisions in favor of coverage" of particular disputes is not applicable (Op. Br. of Appellant at 40). Both the premise and the conclusion are faulty.

1. The Grievance Procedure Created by the Parties' Collective Bargaining Agreement Provides for Final and Binding Arbitration.

a. The Contract Itself Is Binding, Thus, Any Interpretation of the Contract Is Binding Because Such Interpretation Becomes a Part of the Contract.

The dispute involved in the present case is one concerning "the interpretation of . . . provisions of this agreement" within the meaning of article 9, section 1(d) of the Master Agreement (see Op. Br. of Appellant at 39), and it is one which was referred to the Joint Western Committee by the Union Secretary of the Joint Area Committee [R. 82, ¶34(c)]. The Joint Western Committee (the appellate body before whom the dispute is pending) is given authority by the Master Agreement to render a "final decision" [R. 89, art. 9, §1(d)].

The Employer evidently (but we presume not too seriously) considers the fact that such a decision is not specifically denominated *in the grievance section* to be "binding" as well as final, to be of some importance. The absence of the word "binding" in the grievance section, however, is worth no weight since the parties have agreed in other parts of the contract "to be bound by the terms and conditions of this Agreement" [R. 84, preamble], and they have stated that "this Agreement shall be binding upon the parties hereto" [R. 85, art. 1, §3].

The interpretation of a collective bargaining agreement by the body authorized to make such an interpretation becomes a part of the contract; and this being so, it is binding on the parties.

Lewin-Mathes Co., 37 Lab. Arb. 119, 121 (Moore 1961) ("a prior arbitration interpretation of a contract provision becomes part of the agreement");

Stewart-Warner Corp., 33 Lab. Arb. 816, 818-19 (Uible 1960) ("the interpretation of contract language embodied in an award becomes a part of that contract language");

See *H. K. Porter Co. v. United Saw Workers,* 333 F.2d 596, 601 (3d Cir. 1964) (arbitrator authorized to base award on parties' prior interpretation of contract);

Oddie v. Ross Gear & Tool Co., 305 F.2d 143, 151 (6th Cir. 1962) (court may base decision on parties' past interpretation of contract);

Cf. Panza v. Armco Steel Corp., 316 F.2d 69, 70 (3d Cir.), *cert. denied,* 375 U.S. 897 (1963) (relitigation of matter that has been arbitrated is proscribed by doctrine of res judicata).

Not only the contract, therefore, but any interpretation of the contract under the parties' grievance procedure is binding on the parties. Thus, if the Joint Western Committee renders a decision, it shall be binding on the Employer and the Unions.

b. The Present Dispute May Be Submitted to Umpire Handling and May, Therefore, Be One Concerning Which a Final Decision May Arise.

In addition to making decisions of the Joint Western Committee final, the contract states that,

> "all cases deadlocked in the Joint Western Committee with the exception of those provided in sub-

section (f) of this Article *may*[3] be submitted to umpire handling if a majority of the Joint Western Committee determines to submit such matter to an umpire for decision" [R. 89, art. 9, §1(e) (emphasis added)].

In order to arrive at the conclusion that a decision of the Joint Western Committee is not final, the Employer must conjecture that a deadlock shall result and that the Joint Western Committee shall refuse to submit the matter to umpire handling. If all this conjecture comes to pass, there may turn out to be a non-final decision at the Joint Western Committee level.

If, on the other hand, a deadlock results and the matter is submitted to umpire handling, the umpire is empowered to make a "decision" [R. 89, art. 9, §1(e)], which, if the parties intended it to be so, shall be final and binding (see argument following).

c. An Award May Be "Final and Binding" Although the Contract Does Not Use Those Terms.

Following all the conjecture engaged in by the Employer, the Employer's contention is that if the matter were submitted to umpire handling the contract does not state that the umpire's decision shall be "final and binding," and without such language it is argued, the award of the umpire is neither final nor binding (see Op. Br. of Appellant at 39).

A collective bargaining agreement need not use words of art such as "final" and "binding" in order that an

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[3]See *Deaton Truck Line, Inc. v. Local 612, Int'l Bhd. of Teamsters*, 314 F.2d 418, 422 [2] (5th Cir. 1963) (holding that use of the word "may" in the grievance section of a collective bargaining agreement does not make the procedure nonmandatory under section 301(a)); *accord, Independent Soap Workers v. Procter & Gamble Mfg. Co.*, 314 F.2d 38, 43 (9th Cir. 1963).

award rendered pursuant to such an agreement may be enforced. In *General Drivers Union v. Riss & Co.*, 372 U.S. 517 (1963), the Supreme Court indicated that the words "final and binding" need not necessarily appear in the contract. There is no simple formula, said the Court, for determining whether an award may be confirmed under section 301(a), because the issue in each case is a factual one. In the case before it, a case in which the confirmation of an award was in issue, the Court said:

> "[I]f the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement, it is enforceable under §301. . . . Of course, if it should be decided after trial that the grievance award involved here is not final and binding under the collective bargaining agreement, no action under §301 to enforce it will lie" 372 U.S. at 519-20.

The case before this Court is one in which an award rendered by the Joint Western Committee is specifically stated to be final and binding, and we do not understand the Employer to seriously question the fact that it shall be bound by a decision of that body.[4]

The only serious attack is directed at the umpire's decision because the words "final and binding" are not present. Their absence, however, is far from fatal. In other cases interpreting section 301(a), finality has been found where the collective bargaining agreement did not *state* that an award was final but where the par-

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[4]Almost identical contract language as is present here has been involved in numerous other cases, such as *Truck Drivers v. Georgia Highway Express, Inc.*, 328 F.2d 93 (5th Cir. 1964), where confirmation was ordered.

ties construed it as such, *Local 24, Int'l Bhd. of Elec. Workers v. Wm. C. Bloom & Co.*, 242 F. Supp. 421, 425 (D. Md. 1965); where a settlement agreement (which did not state that the agreement was final and binding) was entered into by the parties, and one party sought to have the settlement agreement confirmed under section 301(a), *Amalgamated Meat Cutters v. M. Feder & Co.*, 234 F. Supp. 564, 567-68 (E.D. Pa. 1964); *id.*, 224 F. Supp. 739 (E.D. Pa. 1963); and where, as in the present case, the word "final" did not appear in the contract, but the contract contained no further steps for internal appellate review of a decision, *Transport Workers Union v. Philadelphia Transp. Co.*, 228 F. Supp. 423, 425 (E.D. Pa. 1964).

Thus, the question of finality need not be answered solely by the face of the parties' contract. The answer must await a trial at the time of an application for confirmation or vacation of an award.

d. The Right to Strike to Enforce an Award May Exist Concurrently With the Right to Enforce an Award Judicially; Thus, the Presence of the Right to Strike Does Not Mean There Is No Right to Judicially Enforce an Award.

The Employer evidently argues (see Op. Br. of Appellant at 39-40) that no award under the Master Agreement can be judicially enforced because of the provision of article 9, section 1(i) [R. 89]. This section deals with some of the remedies available—including the right to strike an employer—for failure to comply with the grievance procedure or with a decision of an arbitration committee. From the fact that under this contract the unions are given the right to strike noncomplying employers [see R. 89, art. 9,

§1(h)], it does not follow that an award is not also judicially enforceable. Indeed, the case of *Allied Oil Workers Union v. Ethyl Corp.*, 341 F.2d 47 (5th Cir. 1965), cited and heavily relied upon by the Employer, stands for the proposition that under section 301(a) of the LMRA, courts may not be ousted of their duty to aid the parties in the settlement of contract disputes, and the case directly holds that a srike is *not* the only remedy available for contract enforcement.

See also *International Bhd. of Tel. Workers v. New Eng. Tel. & Tel. Co.*, 240 F. Supp. 426, 430-31 (D. Mass. 1965).

Article 9, section 1(h) of the Agreement comes into play only if a union takes economic action to enforce a decision of a committee. In such event, this section absolves the union from being bound by any tribunal's determination regarding "the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation" [R. 89, art. 9, §1(i)]. This Section cannot be used, therefore, for the proposition that an arbitration award is not binding.

2. The District Court Was Correct in Concluding That the Enforceability of an Award Arising Out of the Grievance Procedure Is Not at Issue in a Proceeding Such as the Present One.

In the district court, the Employer sought to enjoin the arbitration from proceeding on the ground, among others, that no final and binding award would result. The court pointed out that the parties had agreed in article 9, section 1 of the Master Agreement that there would be "no srike, lockout, tie-up or legal pro-

ceeding without first using all possible means of settlement, as provided for in this Agreement, of any controversy which might arise." From this the Court concluded that the Employer's claim of possible nonenforceability of an award as a basis for enjoining an arbitration from proceeding was premature:

> "The policy of the Labor Act can be effectuated only if the means chosen by the parties for settlement of their differences is given full play. *Truck Drivers vs. Riss & Co.*, [372 U.S. 517 (1963)]. Whether the award ultimately made pursuant to the grievance procedure in the case at bar will be binding and enforceable will be resolved at a subsequent proceeding, should one of the parties conclude that such action is required after the award has been made" [Memorandum Op., R. 280].

In the *Riss* case, cited by the district court, the question of whether an award was intended by the parties as their "chosen instrument for the definitive settlement of grievances under the Agreement" was specifically left for the compliance stage of the proceedings, see 372 U.S. at 519.

In an analogous situation (an appeal from an order compelling arbitration), a California court recently denied the right to appeal at that stage of the proceedings, saying:

> "Requiring appellant to submit to arbitration at this time will not substantially affect its rights. In the arbitration proceeding, appellant may prevail. . . . On the other hand, if appellant loses in arbitration it then has a statutory right of appeal. . . ." *Laufman v. Hall-Mack Co.*, 215 Cal. App. 2d 87, 89-90 (1963).

In addition to the lack of injury to the Employer by requiring it to arbitrate its dispute and leave for the compliance stage its argument concerning the non-enforceability of an award, there is an affirmative duty upon the Employer to arbitrate at this time. This duty arises from the terms of the Master Agreement which binds the parties to submit disputes through the proper channels. And this duty is not any the less enforceable even assuming the end result to be a nonbinding award.[5]

The employer's contention, derived from section 203-(d) of the LMRA [29 U.S.C. §173(d)], is that it would violate public policy to require the submission of a dispute to a grievance procedure which does not culminate in a final award. Section 203(d) does not, however, state that "final determinations" are the exclusive approved methods for the settlement of disputes. That section only makes such determinations "the *desirable* method." There would be a far greater injury to public policy by permitting a party to abrogate his contractual commitment through noncompliance with the agreed-upon method of adjustment, than by requiring a party to submit to a procedure which is not *the most* desirable procedure.

A grievance procedure that does not culminate in an enforceable award does not *ipso facto* deprive the Unions of their right to utilize this procedure. The Employer has agreed to submit disputes to the designated committees and it is bound by its agreement.

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[5]Compare the provision of section 3, First (m) of the Railway Labor Act [45 U.S.C. §3, First (m)], which specifically states that money awards shall *not* be "final and binding." Nonetheless, the Supreme Court has held that resort to this non-final grievance procedure is mandatory, *Brotherhood of Locomotive Eng'rs v. Louisville & N. R.R.*, 373 U.S. 33, 38 (1963).

The national policy, as expressed in the *Riss* case, favors such a submission:

> "[T]he policy of the Labor Act 'can be effectuated only *if the means chosen by the parties* for settlement of their differences *under a collective bargaining agreement* is given full play.'" *General Drivers Union v. Riss & Co.*, 372 U.S. 517, 519 (1963) (emphasis added).

The case cited by the Employer, *Allied Oil Workers v. Ethyl Corp.*, 341 F.2d 47 (5th Cir. 1965), does not stand for the proposition that resort need not be had to a non-final grievance procedure (Op. Br. of Appellant at 44). To the contrary, the district court in that case ruled that the parties were absolved from any further steps only "*after* the [non-final] grievance procedures are exhausted," 218 F. Supp. 438, 441 (E.D. La. 1963) (emphasis added), and the circuit court's opinion shows that the parties in fact exhausted all preliminary steps in the non-compulsory arbitration clause of their contract, 341 F.2d at 48. There is no language in that case to support the proposition that the steps leading up to a deadlock, which themselves are mandatory, need not be taken simply because they may not culminate in a final decision.

In sum, the question of enforceability of a decision of one of the committees created by the contract is premature since that question need be answered only at the time one of the parties seeks to confirm or vacate an award. But even though it is unnecessary to a decision in this case, we have shown that the parties' grievance procedure may in fact produce a final and binding award.

B. THE UNIONS' GRIEVANCES ARE ARBITRABLE.

1. The Unions' Grievances Do Not Necessarily Involve a Determination of Unfair Labor Practices.

The Employer contends that the Unions' grievances are nonarbitrable because they necessarily involve a resolution of the question of whether the Employer engaged in unfair labor practices, and such resolution is within the exclusive province of the National Labor Relations Board.[6]

The grievances filed by the Unions allege that certain provisions of the Master Agreement were violated. Under these circumstances, the function of a court "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."

United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

The Supreme Court in the *American Mfg.* case laid to rest the "Cutler Hammer" rule under which a court, in the guise of determining arbitrability, would examine the grievance and deny an order to arbitrate if the court felt the grievance was not meritorious.

The grievances in this case are, on their face, governed by the Master Agreement. For example, article 6, section 1 of the Master Agreement [R. 87], which is alleged by the Unions to have been violated, states that seniority rights are lost only by "discharge, vol-

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[6]As pointed out in note 4 of the Opening Brief of the Appellant, the Board has issued a decision in the relevant unfair labor practice case, *Braswell Freight Lines, Inc.*, 154 N.L.R.B. No. 20, 59 L.R.R.M. 1711 (1965), and has found that the Employer committed unfair labor practices. The Employer's argument may, therefore, be moot.

untary quit, more than a two year (2) layoff," or certain conduct during a leave of absence. In resolving this grievance, the question could, for example, be whether the employees' action constituted a voluntary quit. But whether in resolving the Unions' grievances the arbitral committee finds it necessary to rule on any particular issue or in any particular manner is purely conjectural, and under the *American Mfg.*, as opposed to the "Cutler-Hammer" doctrine, the basis of the decision is irrelevant to the present proceeding.

In the absence of an "express provision excluding [the Unions'] grievance from arbitration," the matter is arbitrable.

United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 584-85 (1960);

Accord, Desert Coca Cola Bottling Co. v. General Sales Drivers, Local 14, 335 F.2d 198 (9th Cir. 1964) (holding that the issue of overtime pay was not "specifically excluded" from the grievance clause of a contract by a provision stating that there shall be no arbitration "concerning wages").

By raising the specter of "unfair labor practices," the Employer seeks to convert the Unions' grievances from what the Unions say they are to something the Employer says they are. But the Supreme Court has disposed of this device as well. In *Local 721, United Packinghouse Workers v. Needham Packing Co.*, 376 U.S. 247 (1964), a union sought to arbitrate the discharge of employees who had been fired for participating in a strike against their employer, and in a counterclaim, the employer sought damages of the union for an illegal strike. The court said:

> "That Needham asserts by way of defense to the union's action to compel arbitration [of the discharges] the same alleged breach of the no-strike clause which is the subject of the counterclaim *does not convert the union's grievance into Needham's different one.*" 376 U.S. at 253 (emphasis added).

See also *Los Angeles Paper Bag Co. v. Printing Specialties Union,* 345 F.2d 757, 759 (9th Cir. 1965).

The Unions' grievances are not what the Employer would have them be, but rather, what the Unions say they are. As such they shall be shown to be not expressly excluded from the grievance procedure and they are, therefore, arbitrable.

2. Even Assuming a Determination Must Be Made by the Arbitration Committees of Matters Normally Decided by the National Labor Relations Board, Concurrent Jurisdiction Exists Between The Board and Arbitrators.

Under the Employer's transposition of the Unions' grievances, the arbitration committee may or may not have to decide questions normally decided by the National Labor Relations Board. Assuming such decision is necessary, the Supreme Court has stated that this is not a bar to arbitration for there is concurrent jurisdiction between the courts, arbitrators and the Board where a breach of contract is involved.

Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964);

Smith v. Evening News Ass'n., 371 U.S. 195 (1962).

The citation by the Employer of cases dealing with preemption is inapposite since those cases dealt with

the commission of torts, where the exclusive remedy admittedly is with the Board, while the present case seeks to remedy a breach of contract. The difference, under the rulings of *Smith* and *Carey* is significant. And this Court has indicated that where the issue is one of contract interpretation, the Board is less competent to decide such matters than the parties' chosen tribunal.

See *NLRB v. C & C Plywood Corp.*, ... F.2d ...., 60 L.R.R.M. 2137, 2140 (9th Cir. 1965);

Square D Co. v. NLRB, 332 F.2d 360, 366 (9th Cir. 1964).

The fact that *conduct* must be assessed by the arbitration committee which may constitute a violation of the LMRA does not deprive the Unions of their right to process a grievance alleging a contract breach. In *Smith v. Evening News Ass'n,* 371 U.S. 195 (1962), the Supreme Court held that a dispute was arbitrable in which the conduct was not only "arguably" but concededly an unfair labor practice.

The Employer's entire argument on the issue of arbitrability, in sum, appears to be grounded on conjecture, for the Employer presupposes a deadlock over the dispute at the Joint Western Committee; presupposes that the Joint Western Committee shall not submit the dispute to umpire handling; and the Employer also has the temerity to forecast that the basis of the ruling by Joint Western Committee (if the Committee is able to come to an agreement) or the umpire (if the dispute is submitted to him), would involve the resolution of the same matters the Board had before it. Even assuming the outcome of this speculation is as

the Employer states it shall be, there still exists no basis for enjoining the arbitration from proceeding since the Supreme Court has clearly held there may be dual forums for this type dispute.

C. THE UNIONS' GRIEVANCES ARE NOT EXPRESSLY EXCLUDED FROM THE GRIEVANCE PROCEDURE.

Under the mandate of *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83 (1960),[7] it is incumbent on the party opposing arbitration to point to express language in the collective bargaining agreement which precludes a hearing of the particular dispute.[8] Two sections of the contract have been adverted to by the Employer. One is section 1(h) of article 9 and the other is section 1(i). Neither is sufficient to meet the test of exclusion.

1. Section 1(i) Does Not Exclude the Unions' Grievances From Arbitration.

The Employer's brief spends four and one-half pages (Op. Br. of Appellant at 18-22) attempting to demonstrate that a phrase in section 1(i) of article 9 excludes the Unions' grievances from consideration by the

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[7] *Accord*, *Association of Industrial Scientists v. Shell Dev. Co.*, 348 F.2d 385, 387-88 (9th Cir. 1965); *Desert Coca Cola Bottling Co. v. General Sales Drivers*, 335 F.2d 198, 200-01 (9th Cir. 1965).

[8] Inasmuch as the rule *in this circuit* is that the parties' bargaining history with respect to the arbitrability of a dispute may be introduced at the district court level, see *Pacific Northwest Bell Tel. Co. v. Communication Workers*, 310 F.2d 244, 247 (9th Cir. 1962); *but see International Union of Elec. Workers v. Westinghouse Elec. Corp.*, 228 F. Supp. 922, 926 (S.D.N.Y. 1964), the burden of demonstrating that a grievance is excluded from arbitration should be commensurately greater in this circuit because the party upon whom the burden rests has more sources of ammunition than in other circuits.

arbitration committees.[9] That so many pages need be devoted to this task is evidence of itself that the exclusionary test requiring an "express provision," *United Steelworkers v. Warrior & Gulf Nav. Co.,* 362 U.S. at 584, has not been met.

The sentence of the contract referred to merely permits an Employer to secure an injunction against a strike which violates the agreement, *cf. Sinclair Ref. Co. v. Atkinson,* 370 U.S. 195, 226 (1962) (dissenting op.) ("States remain free to apply their injunctive remedies against concerted activities in breach of contract"), and has no deeper meaning than that. But even if it had the meaning ascribed to it by the Employer, it would merely permit legal action *by an Employer,* but not forbid the filing of a grievance by a Union.

2. Section 1(h) Does Not Exclude the Unions' Grievances From Arbitration.

Nine and one-half pages of the Employer's brief (Op. Br. of Appellant at 26-35) are devoted to an argument that section 1(h) of article 9 excludes the Unions' grievances from arbitration.[10] The Employer doth protest too much, methinks, and again, the exclusionary test, which requires *clear* language has not been met in this case.

After pointing out that the Unions failed to grieve in advance of their strike, to determine whether or not the strike would be lawful, the Employer concludes

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[9]The phrase reads: "Nothing contained herein shall prevent legal proceedings *by the Employer* where the strike is in violation of this agreement" (emphasis added).

[10]In relevant part, this section reads as follows: "[R]efusal of either party to submit to or appear at the grievance procedure at any stage, or failure to comply with any decision, withdraws the benefits of Article 9."

that the Unions have thus waived their right to arbitrate any issues which are connected with, or arise out of the strike. This conclusion follows, says the Employer, from the fact that the Unions failed "to submit to . . . the grievance procedure" [R. 89, art. 9, §1(h)]. The district court construed the word "submit," otherwise:

> "The phrase 'to submit,' the court concludes, is more reasonably interpreted to mean conduct that must be followed once grievance machinery has been set in motion" [Memorandum Op. R. 277].

And of course this is so, for a telling argument to counter the Employer's interpretation, is that if a party loses the benefits of the grievance procedure as well as the benefits of the no-strike pledge by failing "to submit to . . . the grievance procedure" an arbitrable dispute, then under the Master Agreement no employer may discharge an employee [see R. 91, art. 11, §1], or engage in any other act which is subject to a grievance, without submitting such decision in advance to one of the arbitration committees for approval.

This is patently unreasonable, impractical, and is simply not the manner in which labor relations function. Parties take whatever action they feel is justified and rely upon the other party filing a grievance following that action to ascertain whether or not it was in accord with the parties' contractual obligations. By having taken action which they felt was correct without first submitting their complaint to the grievance procedure, the Unions cannot thereby have waived their right to thenceforth utilize the arbitration provisions of the contract.

Another argument advanced by the Employer is that both the words "submit to" and "appear at" the grievance procedure are found in article 9, section 1(h), and that since they undoubtedly have different meanings, "submit" must mean initiating a proceeding while "appear" connotes being present. The Employer's argument then is as follows:

> "The District Court says 'submit' refers only to conduct '. . . that must be followed once Grievance Machinery has been set in motion . . .'. So interpreted the question is immediately posed as to how a person can 'submit' to a grievance procedure 'already set in motion' other than to 'appear' at the proceedings. . . . In the context in which it appears the term 'submit' must be read as having reference to the act of starting the [grievance] proceedings . . . or it serves no useful purpose" (Op. Br. of Appellant at 30).

To answer the question posed by the Employer as to "how a person can 'submit' to a grievance procedure . . . other than to 'appear,' " one need look no farther than the record in the present case. For here, the Employer "appeared" before the Joint Area Committee, albeit it was a "special appearance" [R. 154, lines 17-21; R. 164, lines 9-14], and at the same time the Employer contended that it was not thus "submitting" to the Committee's jurisdiction.

The language of article 9, section 1(h) which withdraws the benefits of article 9 of the contract from a party who refuses to "submit" to the grievance pro-

cedure, has reference *to a party in default* where a grievance is initiated by his adversary. As a penalty for such default, the party loses the benefits of the no-strike, no-lockout clause of article 9. Section 1(h) does not, however, thenceforth forbid the defaulting party's use of the grievance procedure.

See *Local 721, United Packinghouse Workers v. Needham Packing Co.,* 376 U.S. 247 (1964).

Moreover, although the Employer attempts to obfuscate it, there is a plain difference between stating that a "*controversy* shall be 'submitted' to the 'grievance procedure' " (see examples cited by Employer (Op. Br. of Appellant at 29-30)), and stating that a "*party* [shall] submit to . . . the grievance procedure." The difference is that in the instances cited by the Employer in its opening brief, the contract requires the subject matter of the dispute to be submitted to the grievance procedure, while the use of the word "submit" in article 9, section 1(h) is a jurisdictional term referring to a party.

Finally, the argument made by the Employer based on the word "submit," is one which should properly be made before the arbitrators for it concerns, at most, a *procedural* objection to the Unions' grievances, and under *Livingston v. Wilcy & Sons,* 376 U.S. 543, 555-59 (1964), procedural questions such as these are not for the courts.

D. THE REMAINING ARGUMENTS OF THE EMPLOYER ARE WITHOUT MERIT.

With these major arguments answered, it takes but a word to treat with the Employer's remaining observations.

1. The argument that a reading of the Master Agreement and all the supplements leads to the conclusion that the present grievance is not arbitrable because it involves an interpretation of the LMRA (Op. Br. of Appellant at 23-24), is another attempt by the Employer to transpose the grievances. Two sections of the collective bargaining agreement are claimed by the Unions to have been violated, articles 6 and 10. These grievances arise under the parties' contract and are, therefore, arbitrable.

United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

2. We disagree with the Employer's statement that resolution of the Union's grievances "necessarily involves a determination of whether the Appellant was in fact engaged in unfair labor practices" (Op. Br. of Appellant at 25). While we agree that the arbitration committee must decide the question of whether the Unions' strike violated the collective bargaining agreement [see Conclusion of Law No. 6(b), R. 320-21]; *Los Angeles Paper Bag Co. v. Printing Specialties Union,* 345 F.2d 757 (9th Cir. 1965), it is presumptuous on the Employer's part to attempt to forecast the manner in which the arbitration committee shall arrive at its decision, or the rationale of that decision. Time enough for upsetting an award at the compliance stage if the committee's reasoning discloses that it has tread upon sacred ground.

3. The Employer seeks to punish the Unions for having engaged in a strike which allegedly violated the contract, by depriving them of the right to seek a determination "as to any issue pertaining to or arising out of that controversy" (Op. Br. of Appellant at 32). This ignores the Unions' position that the strike was not in violation of the parties' contract, see *Drake Bakeries, Inc. v. Local 50, American Bakery Workers,* 370 U.S. 254, 256, 263 (1962), and it ignores the conclusions of the district court, with which the Unions agree, that the issues over which the Unions struck were not issues which were subject to the grievance procedure [R. 321, Conclusion of Law Nos. 6(c), (d) and (e)].[11] Further, under the ruling of *Allied Oil Workers v. Ethyl Corp.,* 341 F.2d 47 (5th Cir. 1965), the Employer cannot deprive the Unions of *some* forum.

4. Complaint is registered by the Employer over the fact that the district court did not stay the arbitration proceeding pending a determination by the Board of certain related matters (Op. Br. of Appellant at 49). In addition to the fact that such relief was not requested, this complaint now appears moot inasmuch as a decision has been rendered by the Board finding that the Employer did engage in unfair labor practices.

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[11]Parenthetically, these conclusions were proposed by the Employer [R. 301, 308-09], and were not originally in the Unions' proposals [R. 283, 287].

Conclusion.

The Employer fears that should the arbitrators render a decision, such decision might infringe upon the jurisdiction of the Board. It is a sufficient answer that if the arbitrators fail to hew to the contract they have been empowered to interpret, their award shall be subject to non-confirmation or vacation.

We urge the Court not to become too deeply involved in the Employer's game of speculating as to the contents of the arbitration award. All that is required at this stage is a glance at the parties' contract; and if there is no express bar to the matters sought to be arbitrated, the ruling of the district court should be affirmed and the arbitration should proceed.

Respectfully submitted,

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Attorneys for Appellees.

Certificate.

I Certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JULIUS REICH

No. 20146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRASWELL MOTOR FREIGHT LINES, INC.,

Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,

Appellees.

OPENING BRIEF OF APPELLANT.

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No. 20146

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.,*

Appellees.

OPENING BRIEF OF APPELLANT.

Statement as to Jurisdiction.

The action is brought by an employer, an interstate common carrier, against labor unions for a declaration of rights under a collective bargaining agreement between the parties. The United States District Court for the Southern District of California had jurisdiction by reason of Section 301(a) of the National Labor Relations Act, as amended (29 U.S.C. §185) and 28 U.S.C. §§ 2201-2202. The case is before the United States Court of Appeal for the Ninth Circuit on appeal from a judgment in favor of the defendant labor unions in the District Court [R. A. 312-313].[1] The

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[1] "R. A." designates the Record on Appeal and numerals indicate page references therein.

jurisdiction of the United States Court of Appeals arises by virtue of the provisions of 28 U.S.C. §§ 41, 1291 and 1294.

Statement of the Case.

1. Statement of the Manner in Which the Question Arises.

Appellant is a common carrier by motor vehicle in interstate commerce [R. A. 314-315]. Appellees are local unions affiliated with the Western Conference of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [Teamsters].[2] [R. A. 316]. The sole question on appeal is whether the District Court has correctly declared the rights of the parties under a multi-employer collective bargaining agreement consisting of a "Western States Area Master Freight Agreement" [Master Agreement] and agreements supplementary thereto which were effective from July 1, 1961 through June 30, 1964.[3] The case is before the Court on an Agreed Statement of Facts [R. A. 74-199]. A brief summation of the undisputed facts will aid both in the statement and understanding of the questions of contract interpretation which are presented.

Appellant's operations are conducted between Los Angeles, California, and Dallas and Houston, Texas, and intermediate points of designated routes via El Paso, Texas [R. A. 315]. Since July 1, 1957, Appellant has controlled through stock ownership another common

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[2]Abbreviations to be used in the Brief are indicated in brackets following first use of the name or phrase to be abbreviated.

[3]The complete texts of the Master Agreement and supplements thereto are reproduced as Exhibits A through E of the Statement of Agreed Facts [R. A. 83-140]. All provisions thereof considered by Appellant to be pertinent to issues presented on the appeal are reproduced hereafter either in the text of the Brief or in Appendices.

carrier by motor vehicle known as Braswell Freight Lines, Inc. [Freight Lines] which operates between Fort Worth and Dallas, Texas, and designated points generally north and east thereof in Texas, Oklahoma, Tennessee, Mississippi and Louisiana [R. A. 315].

For several years Freight Lines and certain unions in the area served by Freight Lines affiliated with the Teamsters [Southern Locals] were parties to a multi-employer collective bargaining agreement which expired on January 31, 1961 [R. A. 316]. Neither Appellant nor any of the Appellees was party to that Agreement [R. A. 316].

For collective bargaining purposes, as well as others, the operations of Appellant are separated into an Eastern and Western Division. The Eastern Division includes all operations of Appellant east of El Paso to Dallas and Houston. The Western Division embraces operations El Paso and west [R. A. 315].

Employees on Appellant's Eastern Division are not covered by collective bargaining agreements with any union. During the period they were effective the Master Agreement and supplements covered employees on Appellant's Western Division engaged in the categories of work specified therein [R. A. 315]. Since January 31, 1961, Freight Lines and the Southern Locals have negotiated in an attempt to reach a new collective bargaining agreement covering Freight Lines employees, but no agreement has been reached [R. A. 316-317].

The Southern Locals went on strike against Freight Lines on April 23, 1962. Thereafter on April 28, 1962, the Southern Locals filed with the National Labor Relations Board [NLRB] a charge that Freight Lines, Appellant and J. V. Braswell, Appellant's principal stock-

holder, had engaged in unfair practices against said Southern Locals. A complaint was issued on these charges by the General Counsel for the NLRB on May 8, 1962, charging unfair labor practices by Freight Lines, J. V. Braswell and Appellant in violation of Section 8(a)(1) and (5) of the National Labor Relations Act [Act]. Said NLRB case (hereafter referred to as NLRB Case No. 16-CA-1648), continued pending and undecided at the date of submission of this action for decision.[4]

Articles 8 and 9 of the Master Agreement deal with "Grievance Machinery." Those sections are reproduced in their entirety in Appendix A, hereof, and the procedures therein established will be referred to herein for convenience as the "Grievance Machinery."

Article 9, Section 1 provides, among other things, as follows:

> "The Union and the Employers agree that there shall be no strike, lockout, tie-up or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, of any controversy which might arise." (Appendix A, p. 3).

On June 11, 1962, and without first resorting to the Grievance Machinery, the Appellees called a strike against Appellant and established picket lines at terminals within Appellant's Western Division [R. A. 317]. The strike was called *solely as a protest against the alleged unfair labor practices of Appellant in its deal-*

[4]On July 30, 1965, the NLRB made findings on an order in NLRB Case No. 16-CA-1648, from which both the unions and employers involved appealed. Said appeals are now pending in the United States Court of Appeals.

ings with the Southern Locals which were the subject of NLRB Case No. 16-CA-1648 [R. A. 317]. Most of Appellant's employees on its Western Division who were covered by the Master Agreement joined the strike. Appellant thereupon employed others to perform the work theretofore performed by the strikers.

The strike continued without interruption from June 11, 1962 until April 1, 1963. During April, 1963, and after the strike had ended, the Appellees demanded that the strikers be allowed to return to work in positions to which they would have been entitled on a seniority basis had they continued to work during the strike period [R. A. 318]. It was Appellant's position in response to these demands that the strikers had been permanently and lawfully replaced and had ceased to be employees of Appellant [R. A. 318]. Appellant was at all times willing to accept the strikers for employment as new employees as positions became available [R. A. 318].

On April 30, 1963, each of the Appellee local unions filed a complaint with the Southern California Joint Area Committee established under Article 8 of the Master Agreement [Joint Area Committee] seeking a determination under the Grievance Machinery that Appellant had failed to assign work to the strikers in accordance with their seniority rights and that such failure was a violation of Articles 6 and 10 of the Master Agreement.[5]

Before any hearings were held under the Grievance Machinery the Appellant brought this action seeking a judicial declaration as to what extent, if at all, the

[5]Article 6 (Seniority) Section 1 and Article 10 (Protection of Rights) Section B-1, the specific portions of the Master Agreement mentioned in the complaints, are reproduced as Appendix B hereof.

Appellant is required to submit the questions necessarily involved in deciding the relative seniority rights of the strikers and their replacements for consideration under the Grievance Machinery. The contentions of Appellant on the issues of contract interpretation may be summarized as follows:

(A) The decision as to whether the refusal of Appellant to give the strikers seniority over their replacements necessarily involves a determination, (1) as to whether the strike by Appellees was a breach of the collective bargaining agreement, (2) as to whether the strike by Appellant's former employees was a protected activity under the National Labor Relations Act, and (3) as to whether the Appellant had in fact committed the claimed unfair labor practices against the Southern Locals.

(B) That Appellant is not bound to submit any of the three last mentioned issues (*i.e.,* strike as a breach of contract, strike as a protected activity, or claimed unfair labor practices toward third parties) for handling under the grievance procedures of the Master Agreement.

(C) That, assuming without admitting, some (or all) of the issues above set forth as necessary to the determination of seniority rights are appropriate for handling under grievance procedures the Appellees have waived such right by their own actions.

(D) That, assuming without admitting, the issues posed by the complaint fall within the scope of

grievance procedures and consideration thereof has not been waived no action can be taken under grievance procedures until the NLRB has finally decided whether Appellant did in fact commit the claimed unfair labor practices against third parties which it was the purpose of the strike to protest.

(E) That, in any event, Appellant cannot be required to submit to grievance procedures as requested by Appellees because such procedures do not result in a binding and enforceable arbitration award.

After briefs and oral argument the case was submitted for decision by the District Court on the Statement of Agreed Facts. The District Court's interpretation of Articles 8 and 9 of the Master Agreement in relation to the agreed facts appears in the portion of its Findings of Fact and Conclusions of Law designated as the Conclusions of Law [R. A. 322]. For convenience of reference these "Conclusions of Law" are reproduced in their entirety as Appendix C hereof.[6]

The District Court concluded (contrary to Appellant's contentions) that: (1) if a dispute is one subject

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[6]In a "Memorandum Opinion for Use In Preparation of Findings of Fact, Conclusions of Law and Judgment," [R. A. 273-282], the District Court set forth its conclusions on some, but not all, of the issues presented in the action. Appellant interposed objections to the proposed findings of fact, conclusions of law and judgment submitted by counsel for Appellees [R. A. 283-289]. The findings of fact and conclusions of law signed and filed are those directed by the District Court after a hearing of the objections and Appellant's proposed counter findings of fact, conclusions of laws and judgment [R. A. 312-320].

to grievance resort thereto is mandatory; (2) the dispute as to whether the strike breached the contract is such a dispute; and (3) the benefits of Article 9 (grievance procedure) were not withdrawn as to disputes stemming from the strike because Appellee had taken strike action without first resorting to grievance to receive the same results they sought to accomplish through the strike [R. A. 320-321].

However, the District Court also concluded (supporting Appellant's contentions) that Appellant is not bound to submit for determination through grievance procedures either (1) the question as to whether its former employees were engaged in a protected activity under the National Labor Relations Act when they joined the strike to protest Appellant's alleged unfair labor practices toward the Southern Locals, or (2) the question as to whether Appellants had committed unfair labor practices against the Southern Locals.

The District Court refused to determine whether an award under Grievance Machinery is binding and enforceable on the basis that such determination is not required.

Notwithstanding its conclusion that there are disputes created by the complaints which are not subject to determination under grievance procedures, the District Court has held, both in its conclusions of law and the judgment, that the complaints are subject to determination under the Grievance Machinery and has ordered the action dismissed on the merits [R. A. 312, 321].

2. The Questions Involved.

The basic question on appeal is whether the District Court has correctly interpreted and applied Articles 8 and 9 of the Master Agreement as they relate to the agreed facts. More specifically the questions here presented are these:

1. Is Appellant bound to submit to determination through the grievance procedure the question as to whether the strike of the Appellees called on June 11, 1962, breached the Master Agreement?

2. Were the benefits of the Grievance Machinery, otherwise available, withdrawn as to disputes arising out of the strike when the Appellees elected to strike without first processing their complaint, which was the subject of the strike, through Grievance Machinery?

3. Are the conclusions of the District Court, to the effect that the complaints and the dispute as to whether the strike was a breach of contract must be determined through grievance procedures, fatally inconsistent with the conclusions of the District Court to the effect that Appellant is not bound to submit to grievance determination the questions as to whether the strikers were engaged in a protected activity and whether appellant had in fact committed unfair labor practices?

4. Is the use of Grievance Machinery mandatory if the dispute is one which can be referred thereto?

5. Was the District Court obligated to decide whether the grievance procedure results in an award which is binding and enforceable on the parties?

Specification of Errors.

The judgment of the District Court in favor of Appellees should be reversed because the District Court has committed the following errors, each of which constitutes legal basis for such reversal:

1. The following findings and conclusions contained in the following Conclusions of Law are inherently unreasonable and in direct conflict with the plain language of the collective bargaining agreement:

(a) The finding and conclusion contained in Conclusion of Law 6(b) to the effect the Appellant is bound to submit the question of whether the strike was a breach of the Master Agreement for determination through grievance procedures. (Appendix C, p. 8).

(b) The finding and conclusion contained in Conclusion of Law 6(f) to the effect that the benefits of Grievance Machinery have not been withdrawn as to disputes arising out of the strike because Appellees went on strike without first resorting to Grievance Machinery. (Appendix C, p. 9).

(c) The findings and conclusions contained in Conclusion of Law 9 to the effect that the complaints filed April 30, 1963 are subject to determination under the Grievance Machinery (Appendix C, p. 9).

(d) The finding and conclusion contained in Conclusion of Law 10 that Appellant is not entitled to a judgment. (Appendix C, p. 9).

2. The findings and conclusions contained in Conclusions of Law 9 and 10 to the effect that the complaints of Appellees are subject to Grievance Machinery determination and that Appellant is not entitled to judgment are directly contrary to and cannot be reconciled with the findings and conclusions in Conclusions of Law 6(c), 6(d) and 6(e) to the effect that Appellants are not bound to submit for determination through Grievance Machinery certain disputes which must necessarily be resolved before a determination of the complaints is possible.

3. The findings and conclusions contained in the following Conclusions of Law are in direct conflict with the plain language of the collective bargaining agreement and, inherently unreasonable and are contrary to law:

(a) The finding and conclusion contained in Conclusion of Law 6(a) to the effect that resort to Grievance Machinery is mandatory if the dispute is one which the parties have agreed to submit to determination under grievance procedures in the Master Agreement and supplements thereto. (Appendix C, p. 8).

(b) The finding and conclusion contained in Conclusion of Law 7 to the effect that a determination as to whether an award under the Grievance Machinery is binding and enforceable is not necessary in this action. (Appendix C, p. 9).

ARGUMENT.

1. There Are Certain Principles of Law and Essential Facts Common to All of the Issues Raised on the Appeal.

Summary of the Argument.

Because all issues on the appeal involve interpretation of a written instrument as applied to agreed facts, the Court of Appeals is free to draw its own conclusions as to the meaning of the language involved. The case is one of first impression and is governed by federal law. The Grievance Machinery does not result in final determination of any dispute but it does operate to nullify the "no-strike" pledge. Therefore, rules of interpretation of agreements containing provision for binding arbitration which operates to strengthen and enforce a "no-strike" pledge are not appropriate for determination of the present controversies. The crucial disputes are whether the strikers were engaged in activities protected under Section 7, and the Appellant had committed acts in violation of Section 8(a)(1) and (3) of the Act. It is the policy of the Act that disputes under these sections be resolved by the NLRB and the Courts. That policy must be given effect in the interpretation and application of the Grievance Machinery provisions of the Master Agreement.

The action arises under Section 301(a) of the National Labor Relations Act and is governed by federal law.

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 1 L. ed. 2d 972, 77 S. Ct. 912 (1957);

Atkinson v. Sinclair Refining Co., 370 U.S. 238, 8 L. ed. 2d 462, 82 S. Ct. 1318 (1962).

The relief sought is a judicial determination as to what disputes, if any, presented under the agreed facts the Appellant is bound to submit for consideration under the grievance procedures set up in Articles 8 and 9 of the Master Agreement. No question of ambiguity or bargaining history requiring extrinsic evidence in aid of interpretation is presented. The Court of Appeals is, therefore, free to draw its own conclusions as to the meaning and intent of the contract language and is not bound by those drawn by the trial court.

Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 178 F. 2d 541, 548 (CA-9, 1949);

Smyth v. Barneson, 181 F. 2d 143, 144 (CA-9, 1950);

American Eagle Fire Ins. Co. v. Eagle Star Ins. Co., 216 F. 2d 176, 179 (CA-9, 1954);

Kostelac v. United States, 247 F. 2d 723, 726 (CA-9, 1957).

There have been a number of decisions of the United States Supreme Court dealing with the question of the rules of interpretation to be applied as to the scope and effect of provisions in collective bargaining agreements providing for arbitration resulting in a final and binding award.

See:

United Steelworkers v. Warrior Gulf & Navigation Co., 363 U.S. 574, 4 L. ed. 2d 1409, 80 S. Ct. 1347 (1960);

United Steelworkers v. Enterprise Wheel & Car Corporation, 363 U.S. 593, 4 L. ed. 2d 1424, 80 S. Ct. 1358 (1960);

United Steelworkers v. American Manufacturing Company, 363 U.S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343 (1960);

Drake Bakeries Inc. v. Local 50, 370 U.S. 254, 8 L. ed. 2d 474, 82 S. Ct. 1346 (1962);

The rules of interpretation evolved in these cases are based upon the premise that a "final determination" of grievances over the application and interpretation of a collective bargaining agreement by a "method of settlement" agreed upon by the parties conforms to the policies of the Act (29 U.S.C. 173(d)), furthers labor peace and encourages a higher responsibility of the parties.

There is, however, a fundamental difference between the above-cited and like cases and the one here presented. The Grievance Machinery set up in the Master Agreement does not result in a determination of any dispute which is binding upon the parties. As will be demonstrated more fully in subsequent parts of the Argument, the only expressly agreed result of non-compliance with a grievance procedure decision is the withdrawal of the benefits of the "no-strike" provisions of the contract.

This appears to be the first case in which the courts have been called upon to decide what, if any, status an inconclusive grievance procedure should have in the plan established under the National Labor Relations Act for resolving labor disputes. Because of the fundamental differences in the scope and effect of the contract provisions involved the reasoning which underlies *Warrior* and other similar cases is not here applicable. The issues of contract interpretation must there

fore be resolved on the basis of the relationship of the aims and purposes of the Act.

The District Court apparently did not understand fully the true character of the disputes which Appellees propose should be resolved through grievance procedures. The result is inconsistent and conflicting conclusions.

The immediate subject of the grievance complaint is, of course, the relative seniority of the strikers and their replacements. The essence of the controversy, however, is the interpretation and application of Section 7 and of Sections 8(a)(1) and (5) of the Act.

It has been agreed for purposes of this action that the sole purpose of the strike was to protest violations of Section 8(a)(1) and (5) allegedly committed by Appellant, its principal stockholder and its wholly owned subsidiary toward the Southern Locals. Appellee's sole justification for the strike in face of a "no-strike" provision in the contract is that Appellant's employees who joined the strike were engaging in an activity protected under Section 7 of the Act. If it is ultimately determined the Appellant did not commit unfair labor practices, the strikers are not entitled to reinstatement.

NLRB v. McCatron, 216 F. 2d 212 (CA-9, 1954);

NLRB v. Rives Co., 288 F. 2d 511 (CA-5, 1961);

NLRB v. United Brass Workers, 287 F. 2d 689 (CA-4, 1961).

Even if it is determined that unfair labor practices were committed against the Southern Locals, protest of such conduct by employees on the Western Division may not qualify as a protected activity under Section 7

of the Act. If it does not, the strike of such Western Division employees and Appellees constitutes a violation of the "No-strike" clause of the bargaining agreement and the strikers would not be entitled to reinstatement.

See:

NLRB v. Kaiser Aluminum Co., 217 F. 2d 366 (CA-9, 1954);

Electrical Workers, Local 1113, v. NLRB, 223 F. 2d 338 (CA-DC, 1955).

The Supreme Court has held repeatedly that the NLRB must decide whether conduct constitutes a protected activity under Section 7 or proscribed conduct under Section 8 of the Act. See, for example:

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L. ed. 2d 775, 79 S. Ct. 773 (1959);

Weber v. Anheuser-Busch, 348 U.S. 468, 99 L. ed. 546, 75 S. Ct. 480 (1955).

Determination of the disputes as to legal status of the parties under Section 7 and Section 8(a)(1) and (5) of the Act will solve the question of seniority rights as a matter of law. Therefore, the proper relationship of procedures provided under the Act for solution of these disputes by the NLRB and the right and duty of the parties to delegate such determination for consideration through Grievance Machinery are necessarily involved in each of the specific issues raised before this Court on the Appeal.

2. The Finding and Conclusion of the District Court That the Question as to Whether the Strike Against Appellant Which Began June 11, 1962, Was a Breach of the Master Agreement Must Be Determined Through Grievance Machinery Is Clearly Erroneous.

Summary of the Argument.

The concluding sentence of Article 9, Section 1 expressly reserves to the employees the right to legal proceedings when a strike is in violation of the Agreement. When read in context with other provisions, it is clear the purpose of this concluding sentence is to exempt employers from their general "no legal proceedings" pledge when the Unions have flaunted their obligation to abide by grievance procedures by a strike in the face of their no strike agreement. Further, on the facts here involved, propriety of the strike depends entirely upon whether the strikers are engaged in an activity protected under Section 7 of the Act. The issue of the propriety to strike is, therefore, one arising under the National Labor Relations Act and not a controversy arising under the Master Agreement within the meaning of Articles 8 and 9 thereof. The conclusion the strike issue must be submitted for grievance handling conflicts with legally sound conclusions of the District Court that the question of whether conduct is protected under Section 7 of the Act or proscribed under Section 8 thereof are beyond the scope of grievance procedure determination.

2.1 Preliminary Statement.

In the pleadings and on briefs before the District Court, the Appellant urged the grievance proceedings instituted by Appellees necessarily involve a determination as to whether the strike which began June 11, 1962, was a violation of the Master Agreement and that Appellant is not bound to submit the question of whether the strike was a violation of the agreement to determination through grievance machinery. The Memorandum Opinion prepared by the District Court for use in preparation of proposed findings of fact, conclusions of law and judgment contains no discussion of this issue. However, in its formal findings and conclusions, the District Court has held the Appellant was bound to submit to determination through grievance machinery the question as to whether the strike which began on June 11, 1962, constituted a breach of the Master Agreement [Conclusion of Law 6(b), R. A. 320-321]. Such finding and conclusion is contrary to the plain language of the agreement and inherently unreasonable.

2.2 The Issue as to Whether a Strike Is a Violation of the Master Agreement Is One Which Has Been Expressly Excluded From Consideration Under Grievance Procedure.

Article 9 of the Master Agreement deals with the subject of Grievance Machinery. The opening paragraph of Section 1 of that Article reads as follows:

> "The Union and the Employers agree that there shall be no strike, lockout, tie-up or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, of any controversy which might arise. Disputes shall be

taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedures shall apply:" (Appendix A, p. 3).

In subsections (a) through (g) of Section 1 the parties then set forth the procedure applicable for consideration of a referable controversy (Appendix A, pp. 4-5). As to any particular controversy the grievance procedure therein described ends either in a deadlock or in a decision for or against one of the parties.

Article 9, Section 1(h) provides, among other things, that failure of a party to comply with a final decision withdraws the benefits of Article 9.[7]

Article 9, Section 1(i), the provision having particular pertinence to the present discussion, provides as follows:

> "(i) In the event of strikes, work stoppages, or other activities which are permitted in case of deadlock, default or failure to comply with majority decisions, no interpretation of this Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement. *Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement.*" (Emphasis added).

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[7]One of the issues on appeal is the propriety of the District Court's interpretation of certain portions of Article 9, Section 1(h). This issue is considered in Point 3 of the Argument, *infra*.

Two interpretations of the second sentence of Article 9, Section 1(i) are possible.[8] One interpretation is that the language refers to subsection (i) only. The other is that the sentence creates an exemption to Article 9, Section 1 in its entirety.

The first interpretation must be rejected because under such interpretation the considered language serves no purpose not already achieved by other provisions of Section 1. The undertaking of an employer contained in the opening sentence of Section 1 is to refrain from legal proceedings only until such time as grievance procedures have been concluded. That state has been reached when there is a decision or a deadlock. Therefore, under the language of the first sentence of Section 1 and without regard to the language in subsection (i), the employer is free to take legal proceedings of any kind including one where the strike is in violation of the agreement. Under the provisions of Article 9, Section 1(h), failure of a party to comply with any final decision withdraws the benefits of Article 9 (Appendix A, p. 5). Thus, if the union were the defaulting party it would have no rights under the first sentence of subsection (i). If the employer were the defaulting party, the benefits of the second sentence of subsection (i) would be lost. Since the first sentence of Section 1 and subsection (h), read together, accomplish all of the purposes which would be achieved by

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[8]At first reading it might appear the phrase "the strike" is intended as a reference to a post-grievance strike only. So interpreted the necessary result is that an Employer could institute legal proceedings but the Unions would not be bound thereby and the strikes which could be penalized as a violation of the Agreement would be those the Union consented to so designate. So patently improbable an interpretation is not considered "possible" in the sense the term is here used.

the concluding sentence of subsection (i) if it is read as having reference to other portions thereof only, such restrictive interpretation cannot be justified.

On the other hand, if the concluding sentence of Article 9, Section 1(i) is interpreted as a reference to Section 1 in its entirety, the language serves a most important and useful purpose. The "no-strike" clause is undoubtedly one of the major inducements of the collective bargaining agreement so far as the employer is concerned. The most effective guarantee the employer has that the "no-strike" clause will serve its intended purpose is the threat that legal proceedings by the employer will follow if it is violated.

As pointed out elsewhere in the argument in greater detail, Grievance Machinery does not result in a binding and judicially enforceable determination. Because of the very character of the dispute, the personal loyalties of those entrusted with the power of determination and the inconclusive character of any determination reached under grievance procedures, the possibility that a decision as to whether a strike in the face of a "no-strike" clause violates the agreement will resolve the controversy is virtually nil. The controversy arises only because the union has allegedly by-passed its obligation under Article 9. If the employer were required to resort to grievance procedure to test the legality of the strike before taking legal action while the union was striking to enforce its will in a controversy which should have been, but was not, submitted to grievance the purposes of labor peace and sanctity of agreements sought under the Act would be frustrated completely. The provision that an employer is free to resort to legal action where a strike is in violation of the agreement appears in the

end of Article 9, Section 1. Its location is itself some indication that it has reference to Section 1 in its entirety. So read the concluding sentence in Section 1 serves to make it clear beyond question that nothing which precedes it shall prevent legal proceedings by the employer at any time if a union strikes in violation of the agreement.

In logic the same result follows even if the concluding sentence of subsection (i) were to be interpreted as having reference to that section only. It is wholly illogical to suppose that the employer would take the trouble to require the inclusion in the agreement of an express provision preserving its right to take legal action in the event of a strike in violation of the agreement and then voluntarily frustrate this purpose by agreeing to submit the problem to the inconclusive and non-expert grievance procedure.

Thus, the concluding sentence of subsection (i) must be read either as controlling or persuasive that the parties did not intend that the question as to whether a strike violates the agreement is to be submitted for determination through Grievance Machinery.

Read as a reference to Section 1 in its entirety, the concluding sentence of subsection (i) serves to make it clear beyond question that nothing in Section 1 shall prevent legal proceedings by the employer at any time if a union strikes in violation of the agreement. Under this interpretation legal proceedings to determine whether a strike is in violation of the agreement are expressly excluded from those the employer has agreed to defer in the opening sentence of Section 1. The interpretation of the District Court is therefore wholly untenable when Article 9, Section 1 is considered in its entirety.

2.3 If the Master Agreement and Supplements Are Considered in Their Entirety It Is Clear Appellant Is Not Bound to Submit the Issue of the Validity of the Strike Under the Agreed Facts for Consideration Through Grievance.

Read without reference to other provisions of the agreement, the opening sentence of Article 9, Section 1 appears to require that any controversy which might arise between the parties must be processed through grievances. However, if other pertinent provisions of the agreement are examined it is apparent the issues to be referred to grievance are actually quite limited. For example, in Article 5, Sections 15-17 of the Over-The-Road Supplementary Agreement [R. A. pp. 110-11], provision is made for the determination of certain controversies relating to owner-drivers through a binding arbitration procedure wholly unrelated to and different from Grievance Machinery.

Under Grievance Machinery the first step after direct negotiation is reference to a Joint Area Committee. Article 8, Section 1 of the Master Agreement limits the jurisdiction of Joint Area Committees to grievances involving local unions "arising under this agreement or agreements supplemental hereto." (Appendix A, p. 1). The intent of the parties that this language must be construed in a restricted sense is clearly demonstrated by the fact that they have provided in Article 9, Section 1(d) that "all matters pertaining to the interpretation of any of the provisions of this agreement" fall outside the scope of Joint Area Committee's consideration (Appendix A, p. 4). The limited scope of a Joint Area Committee's jurisdiction is further underlined by the fact that in numerous instances in the supple-

mental agreements the parties have considered it necessary to declare expressly that a particular controversy patently stemming from the fact that the parties have a collective bargaining agreement is to be considered as one "subject to be handled in accordance with the grievance procedures." [See: R. A. pp. 105, 110, 111, 112; R. A. p. 117; and R. A. p. 126].

In the present case the union called a strike during the term of the contract at a time when there was no pending dispute between the parties as to its meaning, interpretation or application.

The sole ground relied upon by Appellees as justification for the validity and legality of the strike is that under the rules announced by the Supreme Court in *Mastro Plastics Corporation v. NLRB,* 350 U.S. 270, 100 L. ed. 309, 76 S. Ct. 349 (1956) the Appellant's employees were exercising a right guaranteed to them by Section 7 of the Act and existing wholly apart from and notwithstanding their "no-strike" pleadge in the agreement. Therefore, the question as to whether the strike was in violation of the agreement presents an issue arising under the National Labor Relations Act and not one "arising under" the Master Agreement as that phrase is used in Article 8, Section 1. The question as to whether activities are protected under Section 7 of the Act is one which has been held to fall within the exclusive province of the NLRB.

See:

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L. ed. 2d 775, 79 S. Ct. 773 (1959).

Since the necessary effect of the holding of the District Court is to compel the parties to submit for determination through grievance an issue arising under Section 7 of the Act over which the NLRB has primary jurisdiction. The District Court's conclusion that the issue as to whether the strike was a violation of the Master Agreement is determinable under grievance is clearly erroneous.

2.4 The Conclusion of the District Court That Appellant Was Bound to Submit to Grievance Handling the Dispute as to the Propriety of the Strike Is in Direct Conflict With the Conclusions That Plaintiff Was Not Bound to Submit to Grievance the Questions Pertaining to Protected Activities Under Section 7 and Proscribed Activities Under Section 8(a)(1) and (5) of the Act.

As has been noted above, it is agreed for the purpose of this action that the strike was called for the sole purpose of protesting alleged unfair labor practices by the Appellant, its principal stockholders and its subsidiary against the Southern Locals. The sole justification for this strike in face of the "no-strike" clause in the contract is that such protest constituted a protected activity under Section 7 of the Act. Therefore, the question of whether the strike was a violation of the Agreement which the District Court says must be submitted for grievance handling necessarily involves a determination of whether the Appellant was in fact engaged in unfair labor practices in its dealings with Southern Locals, and if so, whether the employees in Appellant's Western Division were engaged in an activity protected under Section 7 when they struck solely in protest of

such practices. In its Conclusions of Law 6 (c) and (d), the District Court has held that Appellant was not bound to submit for grievance determination the question of whether its dealings in relation to the Southern Locals constituted an unfair labor practice. (Appendix C, p. 8). Further, in its Conclusions of Law 6 (e), the District Court has decided that the question of whether the Appellant's employees by their strike were engaged in a protected activity is one Appellant is not bound to submit for grievance determination. The conclusions that the question of whether activities are protected under Section 7 or proscribed under Section 8 fall outside the scope of grievance are clearly correct.

San Diego Building Trades Council v. Garmon, 359 U.S. 236, *supra.*

Since both of such determinations are essential to the determination of whether the strike was or was not in violation of the Agreement, the conclusion of the District Court in its Conclusion of Law 6 (b) is, therefore, clearly erroneous.

3. The Interpretation Placed Upon Article 9, Section 1(h) of the Master Agreement Is Both Inherently Unreasonable and in Direct Conflict With the Plain Language of the Agreement.

Summary of the Argument.

The phrase "to-submit . . . to grievance procedures" appears frequently in the bargaining agreement and in the context of the entire writing must be interpreted as a reference to the functions of setting grievance machinery in motion. As interpreted by the District Court the phrase serves no purpose not served by other words in Article 9, Sec-

tion 1 (h). The purpose of Article 9, Section 1 (h) is to provide a punishment for those who would frustrate the consideration of disputes under grievance machinery. Under the interpretation for which Appellant contends the sub-section is a powerful force to that end. Under the District Court's interpretation the subsection is, for all practical purposes, useless as a penalty provision. Assuming, *arguendo,* that the resort to grievance is mandatory and that the issue of the validity of the strike is a covered dispute, sub-section (h) must be construed as creating a bar to the right of the Unions to process the complaints which give rise to this action.

Appellees went on strike against Appellant at locations of its Western Division on June 11, 1962 [R. A. 317]. The Master Agreement containing a "no-strike" clause was then in force. It is admitted that there were then no disputes, outstanding grievances or unresolved controversies between the parties arising out of the Master Agreement [R. A. 5, 70-71]. The sole purpose of the strike was as a protest against claimed unfair labor practices of Appellant, its principal stockholder and its subsidiary against the Southern Locals [R. A. 317]. Appellees have at all times pertinent taken the position their strike does not violate their commitments under the Master Agreement because, so Appellees claim, the strikers were engaged in activities protected under Section 7 of the Act.

At the time the strike was called and continuously since there has been a controversy between the parties as to whether the strike violates the Master Agreement and as to whether the unfair labor practices charged by the Southern Locals were actually committed.

It is the position of Appellees and of the District Court that resort to Grievance Machinery is mandatory as to covered disputes and that the question as to whether a strike is in violation of the Master Agreement is such a covered dispute [R. A. 320-321].

Article 9, Section 1 (h) of the Master Agreement provides as follows:

> "(h) Failure of any Joint Committee to meet without fault of the complaining side, *refusal of either party to submit to or appear at the grievance procedure at any stage*, or failure to comply with any final decision, *withdraws the benefits of Article 9.*" (Emphasis added).

Appellant, of course, denies that Grievance Machinery is mandatory, and takes the position the question of whether the strike was in violation of the agreement is not a covered dispute. It is, however, also Appellant's position that if Grievance Machinery is mandatory and either of the above mentioned disputes is covered thereby Appellees were bound to submit the question as to whether the strike for the purpose indicated would be a violation of the agreement before they struck and that their failure to do so withdraws from them the benefits of Article 9 as to all subsequent controversies arising out of the strike.

The District Court has concluded the phrase "to submit" found in Article 9, Section 1(h) is restricted to conduct that must follow once Grievance Machinery has been set in motion and that the benefits of Article 9 have, therefore, not been withdrawn [R. A. 321].

In the Memorandum Opinion, the District Court states as its reasons for this conclusion simply that such

interpretation appears to the Court to be "more reasonable" and that even if it be assumed the phrase is ambiguous doubts must be resolved in favor of coverage [R. T. 277]. (Citing *Desert Coca Cola Bottling Co. v. General Sales Drivers*, 335 F. 2d 198, at 200-201 (CA-9, 1964). As further support for its conclusion the District Court cites *Packing House Workers v. Needham*, 276 U.S. 247 at 248-253, and *Drake Bakeries, Inc. v. Bakery Workers*, 370 U.S. 254 for the proposition that a union's alleged breach of its promise not to strike did not relieve the employer of its duty to arbitrate [R. A. 277].

Each of the foregoing cases involved a contract containing provision for a binding and judicially enforceable arbitration award. As is noted more fully elsewhere in the Argument, the reasoning upon which the rules of interpretation formulated in such cases is predicated is not pertinent here.[9]

Each specific provision of the agreement must be considered in its context in the larger writing and in the circumstances in which it is written. (*Desert Coca Cola Bottling Co. v. General Sales Drivers, supra*). This the District Court did not do.

The language of Article 9, Section 1(h) here most immediately involved reads— ". . . refusal of either party *to submit to . . . grievance procedure at any stage* . . . withdraws the benefits of Article 9." (Emphasis added). At several places in the supplemental agreements the parties have indicated by express statement that a particular dispute is one to be handled as provided in Article 9, Section 1. Uniformly, they have expressed this intent by the statement that the controversy shall

[9]The discussion referred to appears in parts 1 and 4.

be "submitted" to the "grievance procedure." (See Statement of Agreed Facts, Ex. B, pp. 38-42 [R. A. 111-112]; Ex. C, p. 8 [R. A. 117]; Ex. D, pp. 4-5 [R. A. 126] and Ex. E, p. 11 [R. A. 134]).

Thus, if the bargaining agreement is considered in its entirety it is apparent the parties have used the word "submit" as a word of art meaning both "take to" and "acquiesce in." The term "grievance procedure" is also used as a word of art as a means of reference to all of the provisions of Article 8 and Article 9, Section 1 of the Master Agreement. It is apparent the terms are used in subsection (h) in the same sense as elsewhere in the agreement.

Since the terms "submit to", "appear at" and "failure to comply with" are all used in subsection (h) it must be presumed each is intended to have a different meaning. Each of said terms is quite commonly used as a word of legal art when reference is made to the powers and proceedings of a tribunal. So used, "submit" has a jurisdictional connotation. "Appear" is normally used in relation to presence. "Comply with" is used to mean obedience to action taken by the tribunal.

The District Court says "submit" refers only to conduct ". . . that must be followed once Grievance Machinery has been set in motion . . .". So interpreted the question is immediately posed as to how a person can "submit" to a grievance procedure "already set in motion" other than to "appear" at the proceedings and "comply with" the decisions reached. In the context in which it appears the term "submit" must be read as having reference to the act of starting the proceedings provided for in Article 9, Section 1(a) through (g) or it serves no useful purpose. So read, every word in sub-

section (h) has a distinct meaning both in the framework of the agreement and in its accepted legal sense. Such interpretation to be preferred over the one adopted by the District Court which results in redundancy.

The obvious purpose of Article 9, Section 1(h) is to force the parties to comply with Grievance Machinery. The necessary effect of the holding of the District Court is that a party may wilfully refuse to set Grievance Machinery in motion without penalty but that he will be penalized if he demonstrates a reluctance to go forward with the proceedings once they have been started (possibly by him). Such interpretation makes the penalty an innocuous one.

There is nothing in the Master Agreement to prevent grievance procedures from going forward even though a party refuses "to submit" thereto. If, in such situation, the proceedings result in a decision adverse to the refusing party, there are no benefits of Article 9 remaining to be "withdrawn" as to that dispute. If the decision is favorable to the refusing party and the losing party complies there are still no benefits in Article 9 to be "withdrawn." It is only if there has been a deadlock or if the other party fails to comply with a ruling favorable to the "refusing" party that any benefits could be lost. The loss in such situation is caused by a failure "to comply" and not by any failure to "submit."

If Article 9, Section 1(h) is read as Appellant contends is the true intent of the parties the subsection becomes a powerful weapon to induce the parties to resort to Grievance Machinery for consideration of covered disputes. So read the effect of the provision is that if a party takes strike or other action described in the "no-

strike" clause to enforce its will with respect to a dispute referable to grievance without first asking for a grievance determination he cannot thereafter require the other party to submit to grievance procedures as to any issue pertaining to or arising out of that controversy. As this case demonstrates, a strike called in violation of a "no-strike" clause has a direct and powerful impact on all relationships of the parties covered by their agreement. If a party knows before he takes unilateral action in avoidance of the "no-strike" clause that he will thereafter have no access to grievance as to any matter arising out of such unilateral conduct and that the other party is also freed of its restrictions the likelihood of such unilateral action will be materially reduced.

Packing House Workers v. Needham, 376 U.S. 247, *supra* and *Drake Bakeries, Inc. v. Bakery Workers,* 370 U.S. 254, *supra,* cited by the District Court, are both clearly distinguishable from the situation which is here presented.

In *Needham* the union, after a work-stoppage of employees in protest of an allegedly improper discharge of one of their number, sought to compel the employer to submit the issue of the discharge to a binding arbitration. The employer contended in defense that the breach of the "no-strike" clause terminated all obligations of the employer under the collective bargaining agreement. The Supreme Court held that under the language of the particular agreement involved the duty to arbitrate survived the breach of the "no-strike" clause. The contract in *Needham* apparently contained no express provision as to what effect an unauthorized strike would have upon the right or duty to arbitrate.

There is no contention here that the strike in violation of the "no-strike" clause terminated the agreement in its entirety. Here, unlike *Needham,* the contract does contain a provision providing specifically for at least one consequence of breach of the "no-strike" clause. Appellant seeks to enforce the agreement, including Article 9, Section 1(h) thereof.

In *Drake Bakeries, Inc. v. Bakery Workers,* 370 U.S. 254, *supra,* an employer contended a reduction in force which halted production on one day during a controversy over the legality of a holiday work schedule constituted a strike in violation of a "no-strike" clause and that the strike operated as a waiver by the union of its right to compel arbitration of the issue as to whether there had been a strike in violation of the agreement. The Supreme Court confirmed the duty to arbitrate noting its decision was predicated upon the particular situation before it, including the arbitration provisions of the contract which the Supreme Court characterized as ". . . broad language, indeed . . ." (*Drake Bakeries, Inc. v. Bakery Workers,* 370 U.S. 257, *supra*). Apropos of the question here under consideration the Supreme Court stated:

> "Moreover, in this case, under this contract, by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes." (262, *supra*).

The precise distinguishing situation envisioned in *Drake Bakeries* is here presented in Article 9, Section 1(h). In the same article of the agreement in which the "no-strike" clause appears and the Grievance Ma-

chinery is established there is a provision that says the refusal to resort to such procedures withdraws all benefits of such procedure for that controversy. In short, the parties to the agreement here under consideration have conditioned the duty to submit to Grievance Machinery upon the absence of strikes.

The interpretation placed on Article 9, Section 1(h) by the District Court is wrong because it is unfair. Refusal of a party to participate in grievance procedures after they have been set in motion neither invalidates the proceedings nor prevents a decision binding upon the reluctant party. Nonetheless a party who refuses to participate in such proceedings after they have been set in motion is penalized by loss of benefits of Article 9. But a person who violates both his "no-strike" pledge and his duty to institute Grievance Machinery procedures if a controversy cannot be resolved by mutual agreement suffers no penalty of loss of rights whatsoever. As a matter of fact, if such party is careful to show up at any Grievance Machinery proceedings which might be set in motion by the other party with respect to the controversy his strike may be converted into a lawful post-grievance strike if the proceeding happens to deadlock, or is decided in his favor. An interpretation which is so inherently unreasonable cannot possibly be accurate.

The parties now find themselves before this Court because Appellant believes, and has at all times believed, that the procedures established in Articles 8 and 9 of the Master Agreement are not mandatory and, in any event, that the issue as to whether the strike is in violation of the agreement is not determinable under the

grievance procedures therein established. However, assuming for the argument Appellant's position is incorrect, the question arises as to whether the Union has brought itself within the prohibitions of Article 9, Section 1(h). The answer is that it has.

The position of the unions before, during and since the strike has been that the strike action was an activity protected under Section 7 of the Act and, therefore, by law an exception to the "no-strike" undertakings in Article 9. All of the facts necessary to determination as to whether a strike by Appellant's employees in protest of alleged unfair activities committed against the Southern Locals constitutes a violation of the Master Agreement which are available now were available before the strike was called. Article 9, Section 1(d) specifically provides that any party to the agreement may request an interpretation of the provisions of the agreement through grievance procedures therein provided *at any time*. From the interpretation which the District Court has placed upon the agreement a similar result could also be achieved through the procedures in Article 9, Section 1(a) (Appendix A, p. 3). Therefore, under the premise of the District Court that grievance procedures are mandatory as to covered disputes and that the issue of whether the strike violates the agreement in such a dispute the unions were bound to resort to grievance to determine whether their interpretation of the "no-strike" clause was valid. When they failed to do so and went on strike they evidenced a refusal "to submit . . . to grievance procedures" in the most positive way possible and thereby forfeited the benefits of Article 9.

4. **If Resort to Grievance Is Mandatory Under the Agreement the Provision Therefor Is Void and Against the Public Policy of the National Labor Relations Act.**

Summary of the Argument.

The judicial and administrative remedies provided for in the Act are necessary to preservation of labor peace and the sanctity of collective bargaining agreements which it is the primary purpose of the statute to achieve. True arbitration resulting in a judicially enforceable award also furthers the purpose of the Act. Since the policy of the law is to favor only those private means of settlement which result in a "final adjustment" inconclusive grievance procedures are not affected thereby. Any agreement forcing parties to resort to a grievance procedure which is inconclusive necessarily runs counter to the policies of the Act because prompt definitive settlement is frustrated and burdensome but ineffective extension of disputes is encouraged. The terms of the particular agreement here involved are such that grievance procedures necessarily destroy all contract protections with respect to the controversy and oust all tribunals of the power to make interpretations of the agreement which will be binding on the parties. Therefore, under the provisions here involved Grievance Machinery becomes simply a vehicle by which the parties can be relieved of contractual oblagations under their collective bargaining agreement and the unions can be freed from the restraining effect of binding judicial interpretations of such agreement. Since, if resort thereto is mandatory, the procedures serve no

ultimate purpose except to frustrate and defeat the purposes of the Act and destroy altogether any right to a definitive adjudication of disputes it must be held that the provisions are void as against the policies of the Act.

One of Appellant's primary contentions in this action is that Grievance Machinery decisions are not binding and judicially enforceable and that it would, therefore, be contrary to the purposes of the National Labor Relations Act to hold resort to grievance procedures is mandatory. On this issue the case is clearly one of first impression. The conclusions of the District Court do not resolve the question. Restatement of Appellant's position is, therefore, required.

The fundamental purpose of the National Labor Relations Act is to minimize strikes and promote industrial stabilization through collective bargaining agreements.

29 U.S.C.A. §151;

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, *supra.*

Section 301 of the Act authorizes judicial actions to interpret and enforce collective bargaining contracts. It is now firmly established that Section 301 establishes substantive rights under federal law and that "comprehensiveness is inherent in the process by which such law is to be formulated . . ."

Teamsters Union v. Lucas Flour Company, 369 U.S. 95, 103, 7 L. ed. 2d 593, 82 S. Ct. 571 (1962);

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 1 L. ed. 2d 972, 77 S. Ct. 912 (1957).

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The scope of judicial power under Section 301 must not be limited more than is necessary.

> *Smith v. Evening News Association*, 371 U.S. 195, 199, 9 L. ed. 2d 246, 83 S. Ct. 267 (1962).

However, in Section 203 (d) it is also a stated policy of the Act that "final adjustment" by a method agreed upon by the parties is the desirable method for settlement of grievance disputes arising over the application or interpretation of collective bargaining agreements.

Therefore, in every case in which a collective bargaining agreement contains provisions for some extra-judicial consideration of disputes there is presented the problem of accommodating the policy of private settlement with the necessity for a comprehensive judicial power so as to best achieve the over-all purposes of the Act.

It is, of course, now well settled that if a collective bargaining agreement contains provisions for a true arbitration resulting in a binding and enforceable award submission thereto is mandatory as to an arbitrable dispute and that such agreements ae to be construed liberally in favor of coverage.

> *Drake Bakeries, Inc. v. Bakery Workers*, 370 U.S. 254, *supra*.

This, however, appears to the first case posing the questions:

(1) Whether parties to a bargaining agreement may lawfully bind themselves to resort to an inconclusive grievance procedure for consideration of disputes otherwise then justiciable by the Courts or the NLRB, or both, under the Act; and

(2) If so, whether such agreements are to be strictly or liberally construed as to the disputes covered.

The answers to these questions will have far reaching consequences. Their significance is emphasized by the fact that they arise in a fact situation in which the potentially referable controversy includes the questions as to whether a strike was in violation of a "no-strike" clause and the defense of its legality is that it was an activity protected under Section 7 of the Act.

With respect to these questions it is Appellant's position: (1) that the provisions of the present agreement are such that if the duty to resort to grievance is mandatory the obligation is void because it is inimical to the basic policies of the National Labor Relations Act, and (2) that, at the very least, the policies of that Act require a strict interpretation against coverage.

The Grievance Machinery does not result in an award which is judicially binding and enforceable. The rights of the parties after grievance are fixed in Article 9, Section 1 (i). Therein they have expressly agreed that all questions of agreement interpretation (except whether a strike violates the agreement) shall be resolved only by mutual agreement. No intepretation of the agreement by any tribunal is to be binding upon a union unless the union so stipulates. Article 9, Section 1 (a) does contain a statement that a decision of a Joint Area Committee is "final and binding." There is no comparable language with respect to proceedings before the Joint Western Committee or the Impartial Umpire.[10] If the quoted phrase in subsection (a) is

[10]In one of the supplemental agreements the parties have provided for arbitration (so named) in a special situation and

read in context with subsection (i), it is apparent the words are used to indicate the "self-help" and prohibition against judicial enforcement provisions of Sub-Section (1) become effective at once.

The rule of liberal interpretation of true arbitration provisions in favor of coverage is simply an implementation of the policy set forth in Section 203 (d) of the Act that "final adjustment" of grievances by agreed methods is desirable. The grievance procedure here does not result in a "final adjustment." The policy of the Act in Section 203(d) is, therefore, not here pertinent and should not be applied.

True arbitration strengthens the collective bargaining agreement and supplements the activities of the courts and other tribunals in achieving peaceful settlement of labor-management disputes. The ultimate effect of the Grievance Machinery under the present contract is to remove any considered controversy from the coverage of the agreement and to oust all tribunals of all power to make a binding interpretation of such agreement. Thus, the goals of Grievance Machinery are the direct opposite of the goals of a true arbitration. The same logic which induces liberal interpretation of true arbitration provisons in favor of coverage requires a strict interpretation against such coverage here.

Whether mandatory resort to an inconclusive grievance procedure is *per se* against the public policy of the

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have made an award under arbitration binding. They thus demonstrate knowledge of appropriate words and how to use them when true arbitration is intended [R. A. 110-111].

Act it is not necessary here to decide. However, the only cases Appellant has been able to discover touching on the subject suggest that such should be the rule.

In *Drivers Union v. Riss & Co.,* 372 U.S. 517, 9 L. ed. 2d 918, 83 S. Ct. 789, a teamster contract having provisions similar in many respects to those here presented was before the Court on review of an order of a District Court dismissing for want of jurisdiction an action under Section 301 seeking to compel compliance with a grievance procedure decision requiring reinstatement of a discharged employee. The judgment of the lower court was reversed and the case remanded for a determination by that court as to whether the grievance procedure resulted in a binding and enforceable award. However, in its opinion the Supreme Court did make the following observation:

> "Of course, if it should be decided after trial that the grievance award involved here is not final and binding under the collective bargaining agreement, no action under § 301 to enforce it will lie. Then, should petitioners seek to pursue the action as a § 301 suit for breach of contract, there may have to be considered questions unresolved by our prior decisions. We need not reach those questions here . . ." (*Drivers Union v. Riss & Co.,* 372 U.S. 517, 520, *supra.*

In *Wiley & Sons v. Livingston,* 376 U.S. 543, *supra,* the question was whether a true arbitration provision in a collective bargaining agreement was enforceable against a successor of the employer through merger

when the agreement did not contain express language to that effect. It was there held that because of the policy of law favoring true arbitration the agreement should be interpreted in favor of its coverage of a successor in interest of the contracting party. Apropos of the present situation the Supreme Court stated:

> "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so a fortiori, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." (*Wiley & Sons v. Livingston,* 376 U.S. 543, 547, *supra*).

The District Court construed the word "bind" as used in the foregoing language as a reference to the creation of a contractual relationship. Assuming, *arguendo,* the accuracy of this view, the principle expressed in said quotation continues to apply here. The reason for compelling parties to resort to a true arbitration to the exclusion of judicial remedies in the Act is the policy of the law in favor of private settlements and the over-all final adjustment of disputes which is thereby achieved. If a decision in a grievance proceeding is made unenforceable by the express terms of the bargaining contract the effect, in terms of the purposes to be achieved under the Act, is the same as though there had been no agreement at all.

Since the present case was decided by the District Court there has been one Court of Appeals decision

which bears upon the question here under consideration. In *Allied Oil Workers Union v. Ethyl Corporation,* 341 F. 2d 47 (CA-5, 1965) the agreement provided for a mandatory grievance procedure not resulting in an enforceable decision and for true arbitration thereafter if the parties consented thereto on an *ad hoc* basis. The employer had made certain classifications of work and had apparently refused to participate either in the grievance procedures instituted by the union or to consent to arbitration thereafter. The unions sought declaratory relief under Section 301 which the employer opposed on the grounds (1) that the effect of the action was to compel arbitration in violation of the agreement, (2) that the remedy of the union was self-help, and (3) that the employer was right on the merits of the controversy. The District Court accepted the first two contentions and rejected the third. The Court of Appeals reversed the lower court on the first two issues and held the Courts cannot be ousted of jurisdiction and the parties relegated to the remedy of self-help by an inconclusive grievance procedure provision. The trial court was, however, sustained on the third issue. The effect is a determination that *de novo* judicial determination of a dispute appropriate for consideration under the inconclusive grievance procedures is authorized by law.

With respect to the problem of accommodating the inconclusive grievance procedure to the purposes of the Act the Court stated as follows:

> "It is true, and we recognize, that this case is somewhat different from the usual case under Section 301, in that the contract here involved contains only a permissive arbitration clause. Yet it is

> in a case such as this that we find Section 301 to have its most salutary effect, namely, the avoidance of industrial conflict by providing the parties to an honest dispute over the interpretation of their contract with a peaceful alternative to economic disruption." (*Allied Oil Workers Union v. Ethyl Corporation,* 341 F. 2d 47, *supra*).

Appellant submits the necessary effect of the holding in *Allied Oil Workers* is that the policies of the Act preclude mandatory referral of controversies to inconclusive grievance procedures to the exclusion of concurrent resort to judicial and other tribunals capable of a definitive answer to the dispute.

In this case, as in any other involving contract interpretation, the primary question is the operation and effect of the specific agreement involved. Whatever may be the rule in any other case, it must follow that the particular provisions here involved are against public policy, and, therefore, void if they do indeed make resort to Grievance Machinery mandatory.

As was spelled out in some detail in *Warrior,* the policy of the Act is to promote industrial stabilization through the collective bargaining agreement. A binding arbitration substitutes a rule-by-law for the temporary resolution of controversies dependent solely upon the relative strength, at any given moment, of the contending forces.

Under the provisions of Article 9, Section 1(i) the effecting procedures (whether they end in a "no-decision" deadlock or a refusal of a party to comply) is that the controversy involved is removed entirely from the protections of the collective bargaining agreement

and must thereafter be resolved, if it is resolved at all, by the "mutual agreement" which is the result of the "relative strength of the contending forces." Since the Grievance Machinery provision runs directly counter to the policies of the Act of avoiding strikes and encouraging the final adjustment of differences through agreement it must necessarily be against public policy if it is deemed to be mandatory.

If the resort to grievance procedures here provided is mandatory, the effect upon the adjudicative processes carefully set up and preserved in the Act as necessary to accomplish its purposes is devastating. Under Article 9, Section 1(i), if a union can induce deadlock at any stage in the proceedings (a very real possibility because of the qualifications for committee membership) all powers of the federal courts, of the NLRB and of any other tribunal which might otherwise have jurisdiction to make an interpretation of the agreement binding on the union are destroyed.[11]

Theoretically, inconclusive grievance procedures can serve as a deterrent to disruptive and ill-considered unilateral action. This consequence would undoubtedly follow in some measure if, as to any given controversy, the parties are in agreement that such procedures be used. In such circumstances the parties approach their dispute in the mood of peaceful disposition so that an advisory opinion can serve a useful purpose.

However, when it is necessary to force a party to go to grievance which he knows in advance can be stultified by deadlock of a Committee composed equally of union and employer representatives the usefulness of the

[11]The sole exception being a controversy as to whether a strike is in violation of the agreement.

procedure as a vehicle of labor peace is minimal. This is especially true since one of the necessary results of deadlock is a release of the parties from their "no-strike" pledge and the union from judicial evaluation of its position.

The basic evil of the contract provisions here under consideration is that they are so drawn and designed that the parties, the unions particularly, are in better position, if they really want to fight, if they go through grievance than if they do not. Simply by forcing an issue to grievance and then inducing a deadlock the union is at once released of its "no-strike" pledge and of the possibility that any tribunal can effectively defeat the construction which the union chooses to place upon the agreement. Thus, settlement by force, which the Act seeks to eliminate, is fostered.

The conclusion of the District Court has been made without consideration of any of the above described major problems of policy under the Act which follow necessarily as a consequence. Its decision is further unsound because the District Court has failed to recognize that a determination as to whether the Grievance Machinery results in a binding award is vital. Only by such determination can the policy of interpretation of entire agreement be fixed and its legality determined.

As earlier stated, the case presents an issue of first impression. The problems which it poses have been recognized but a decision thereof deliberately deferred in earlier Supreme Court cases. The one Court of Appeals decision which has some pertinence supports the position for which Appellant here contends. The determination of the District Court that resort to griev-

ance procedure is mandatory even though such procedure may be inconclusive should be reversed on the basis of the language of the contract and public policy under the Act.

5. **There Are Fatal Inconsistencies in the Conclusions and Judgment Which Preclude a Clear Understanding of the Basis of Decision and Make Necessary an Affirmative Declaration of the Rights of the Parties by the Court of Appeals.**

Summary of the Argument.

Whether the strike was in violation of the contract and the strikers have seniority depends upon whether the strike was a protected activity under Section 7 of the Act and whether the Appellant did in fact commit unfair labor practices. The conclusions that the disputes of legality of the strike and seniority must be submitted for grievance determination but that Appellant is not bound to submit to grievance the questions necessary for such required determinations are fatally inconsistent. Further, the District Court has made findings in favor of Appellant on certain of the issues presented but has adjudged the action be dismissed. Because the case involves only the question of interpretation of a written instrument as applied to agreed facts it is proper for the Court of Appeals finally to resolve all issues in the action. It should do so.

The action is brought for clarification of the rights of the parties under the Grievance Machinery provisions of their agreement in relation to certain pending and undetermined disputes. Because of the conflicting conclu-

sions of the District Court the parties find themselves at the end of the litigation with their disputes as to the contract's meaning for practical purposes, still unresolved.

The problem of the legality of the provisions if resort to grievance is mandatory has not been considered. The District Court has decided "the complaints" filed April 30, 1963 are subject to determination through Grievance Machinery [R. A. 321]. The judgment declared the "disputes" (without limitation) which have arisen between the parties are subject to grievance. The conclusion and judgment are for outright dismissal of the action. However, the District Court has also concluded Appellant is not bound to submit for determination under grievance procedures either the question as to whether the strike action was a protected activity under Section 7 of the Act or the question as to whether Appellant did in fact engage in unfair labor practices in its dealings with the Southern Locals.

The parties contending for seniority in the disputes which give rise to this action are the strikers and their replacements. In *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270, *supra*, it was held that a strike by employees against flagrantly unfair labor practices committed directly against them by their employer was an exercise of a protected activity under Section 7 of the Act and that under the terms of the particular agreement the "no-strike" clause could not reasonably be construed as a voluntary waiver of that statutory right. Appellee's sole justification for the strike action here taken is that the strike in protest of claimed unfair labor pracices of Appellant against the Southern Locals is a protected activity and proper notwithstanding the "no-strike"

clause in the contract under the holding of *Mastro Plastics.*

Until such time as it is determined whether the strike was or was not a protected activity under the Act and whether the Appellant did ot did not commit unfair labor practices toward the Southern Locals, the facts essential to a decision of the question of the legality of the strike, and, therefore, of seniority rights are not at hand.

The necessary effect of the holding of the District Court is, therefore, that Appellant is not bound to submit to determination through grievance the issues upon which the issues of strike legality and seniority depend but that it is lawfully bound to go forward with a determination of the legality-of-strike and seniority issues nonetheless.

In cases arising under Section 301 of the Act involving situations similar to that here presented the Courts have frequently stayed action pending further developments under the agreements of the parties after judicial determination.

> *Drake Bakeries v. Bakery Workers,* 370 U.S. 254, *supra.*

Here the court simply dismissed the action notwithstanding the fact that certain of its conclusions were in Appellant's favor.

As a result of the conflicts in the conclusions reached and the manner in which the District Court has disposed of the case the problem as to procedure on the complaints under the Grievance Machinery still remain.

The case is before the Court of Appeals on an agreed statement of facts. The issues relate exclusively to the

interpretation of a written collective bargaining agreement which is before this Court. The posture of the case is, therefore, such that the Court of Appeals can resolve all aspects of the controversy. The Court should so act.

6. Conclusion.

For the reasons and upon the grounds hereinabove set forth, the conclusions and judgment of the District Court are clearly erroneous. This Court should exercise its right to correct these errors both by a declaration of the true rights of the parties under the agreement on the questions raised and a reversal of the judgment.

Respectfully submitted,

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Of Counsel:
RUSSELL & SCHUREMAN,

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

THEODORE W. RUSSELL

APPENDIX A.

Text of Article 8 and Article 9 Section 1 of Western States Area Master Freight Agreement Effective July 1, 1961 Through June 30, 1964.

ARTICLE 8. GRIEVANCE MACHINERY COMMITTEES

Section 1. Joint Area Committees

The Employers and the Union shall establish permanent joint area labor-management committees as follows: one (1) for the State of Washington and Northern Idaho; one (1) for the State of Oregon; three (3) for the States of California and Nevada; one (1) for the States of Colorado and Wyoming; one (1) for the States of Utah and Southern Idaho; one (1) for the States of Arizona and New Mexico, and El Paso, Texas, and one (1) for the State of Montana. Each such committee shall be referred to hereinafter as "Joint Area Committee." The Union and Employer committees shall consist of three (3) members and three (3) alternates. Each member may appoint an alternate in his place.

The Joint Area Committee shall at its first meeting formulate rules of procedure to govern the conduct of its proceedings. Each Joint Area Committee shall have jurisdiction over disputes and grivances involving Local Unions, or the complaints by Local Unions, arising under this Agreement or agreements supplemental hereto in the respective areas of each of the Joint Councils as set forth in the first (1st) paragraph of this Section.

Section 2. Joint Western Committee

The Employers and the Unions shall together create a permanent Joint Western Committee which shall consist of delegates from each of the areas named in Sec-

tion 1 of this Article, and this Committee shall meet at established times and at a mutually convenient location.

The Joint Western Committee shall formulate rules of procedure to govern the conduct of its proceedings as it may deem advisable.

Section 3. Function of Committees

It shall be the function of the various committees above-referred-to to settle disputes which cannot be settled between the Employer and the Local Union in accordance with the procedures established in Article 9, Section 1.

Section 4. Change of Terminals and/or Operations

Present terminals, breaking points, or domiciles shall not be transferred or changed nor shall there be any transfers of equipment between terminals which will adversely affect the employment opportunities of the employees at the terminal from which such transfer of equipment is to be made without the Employer first having asked for and received approval from the sub-committee on Change of Operations, the members of which shall be appointed by the Joint Western Committee at each regular meeting. This shall not apply within the established city cartage radius of the individual Local Union.

Section 5. Attendance

Meetings of the Joint Western and the Joint Area Committees shall be attended by each member of such committee or an alternate.

Section 6. Examination of Records

The Local Union, Joint Area Committee, or the Joint Western Committee shall have the right to examine time

sheets and any other records pertaining to the computation of compensation of any individual or individuals whose pay is in dispute.

ARTICLE 9. GRIEVANCE MACHINERY AND UNION LIABILITY

Section 1. Procedures

The Union and the Employers agree that there shall be no strike, lockout, tie-up or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, of any controversy which might arise. Disputes shall be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall then apply:

(a) Where a Joint Area Committee by a majority vote settles a dispute, no appeal may be taken to the Joint Western Committee. Such a decision will be final and binding on both parties. Provided, however, that the Joint Western Committee shall have the right to review and reverse any decision of the area Committee and make a final decision on the case if the Joint Western Committee has reason to believe the decision was not based on the facts as presented to the Area Committee or in the possession of either party and not presented to the Area Committee; provided further, however, that such action by the Joint Western Committee may be taken only by unanimous vote.

Action by the Joint Western Committee to review a decision made by a Joint Area Committee must be taken no later than the second regular meeting of the Joint Western Committee following the rendering of the decision by the Joint Area Committee, or the right to such review and any possible reversal is waived.

(b) Where a Joint Area Committee is unable to agree or come to a decision on a case, it shall, at the request of the Union or the Employer involved, be appealed to the Joint Western Committee at the next regularly constituted session.

(c) Minutes of the Area Committee shall set forth the position and facts relied on by each party, but each party may supplement such minutes at the hearing before the Joint Western Committee.

(d) It is agreed that all matters pertaining to the interpretation of any provisions of this Agreement may be referred by the Area Secretary for the Union or the Area Secretary for the Employers at the request of either the Employers or the Unions, parties to the issue, with notice to the other Secretary, to the Joint Western Committee at any time for final decision. At the request of the Company or Union representative, the Joint Western Committee shall be convened on seventy-two (72) hours notice to handle matters so referred.

(e) All cases deadlocked in the Joint Western Committee with the exception of those provided in sub-section (f) of this Article may be submitted to umpire handling if a majority of the Joint Western Committee determines to submit such matter to an umpire for decision. Otherwise either party shall be permitted all legal or economic recourse.

(f) Any cases deadlocked in the Joint Western Committee which pertain to sub-contracting, closing of terminals, discontinuance of runs, discharge and suspension shall be submitted to umpire handling.

(g) The Impartial Umpire referred to in sub-sections (e) and (f) shall be selected on a case to case basis

by the Joint Western Committee from a list of arbitrators submitted by the San Francisco Regional Office of the Federal Mediation and Conciliation Service. Such Umpire shall be selected immediately by the Joint Western Committee upon deadlocking the case, and a hearing on the deadlocked case shall be commenced in San Francisco within three (3) days from the deadlock by the Joint Western Committee. Decisions of the Umpire shall be issued not later than ten (10) days from the close of the hearing unless the parties involved mutually agree to the contrary. The decision of the Umpire shall be specifically limited to the matter submitted to him and he shall have no authority in any manner to amend, alter or change any provision of this Agreement. The compensation of the Umpire shall be determined by the Joint Western Committee and all expenses incurred shall be borne jointly.

(h) Failure of any Joint Committee to meet without fault of the complaining side, refusal of either party to submit to or appear at the grievance procedure at any stage, or failure to comply with any final decision, withdraws the benefits of Article 9.

(i) In the event of strikes, work stoppages, or other activities which are permitted in case of deadlock, default or failure to comply with majority decisions, no interpretation of this Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement. Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement.

APPENDIX B.

Text of Article 6 Section 1 and Article 10 Section B(1) of the Western States Area Master Freight Agreement Effective July 1, 1961 Through June 30, 1964.

ARTICLE 6. SENIORITY

Section 1. Seniority Rights

Seniority rights for employees shall prevail under this Agreement and all agreements supplemental hereto. Seniority shall only be broken by discharge, voluntary quit, more than a two (2) year layoff or as provided in Article 5, Sections 2 and 3 of this Agreement, or any applicable provisions of the Supplemental Agreements.

B—SAVINGS CLAUSE

Pending a determination by the National Labor Relations Board that the above Article 10, A, is valid, or in the event of a determination by such Board that such Article is invalid, then pending final determination by the Court, the Union and the Employer shall comply with and enforce only the following modification thereof:

Section 1. Picket Line

It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a lawful primary labor dispute, or refuses to go through or work behind any lawful primary picket line, including the lawful primary picket line of Unions party to this Agreement, and including lawful primary picket lines at the Employer's places of business.

APPENDIX C.

(A Reproduction of a Portion of the Findings of Fact and Conclusions of Law of the United States District Court. For Full Text See R.A. 314-322.)

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the action under §301 (a) of the Labor Management Relations Act, as amended (29 U.S.C. §185 (a)) and under 28 U.S.C. §§2201, 2202.

2. Plaintiff is an employer in an industry affecting commerce, and is an "employer" within the meaning of the Labor Management Relations Act.

3. Defendants are each labor organizations representing employees in an industry affecting commerce and are each "labor organizations" within the meaning of the Labor Management Relations Act.

4. At all times during the period between July 1, 1961, and June 30, 1964, both inclusive, the Plaintiff and the Defendants were parties to a collective bargaining agreement designated as "Western States Area Master Freight Agreement" (herein called the "Master Freight Agreement") and supplements thereto covering employees of Plaintiff engaged in operations of the Plaintiff west of El Paso, Texas, who were members of the Defendant Unions.

5. Plaintiff, by the present action, seeks a determination of its rights and obligations under Articles 8 and 9 as they related to the complaints filed by the Defendants April 30, 1963.

6. With respect to said determinations sought by the Plaintiff as to the meaning and interpretation to be placed on the Master Freight Agreement, the Court concludes:

(a) Resort to the grievance procedures set forth in Article 8 and Article 9 of the Master Freight Agreement is mandatory if the dispute is one which the parties have agreed to submit to determination under grievance in the Master Freight Agreement or supplements thereto.

(b) Plaintiff was bound to submit to determination through grievance procedures the question as to whether the strike of Locals 208, 224, 357, 495 and other labor organizations called on June 11, 1962, and continued to April 1, 163, constituted a breach by said labor organization of the Master Freight Agreement.

(c) Plaintiff was not bound to submit to determination under the grievance procedures the question as to whether or not the conduct of Plaintiff, Freight Lines and J. V. Braswell in their dealings with the Southern Locals constituted unfair labor practices in violation of Sections 8 (a) (1) and (5) of the National Labor Relations Act.

(d) Whether or not Plaintiff, Freight Lines and J. V. Braswell, or any of them committed unfair labor practices in their dealings with the Southern Locals is for the National Labor Relations Board to determine.

(e) Plaintiff was not bound to submit to determination through grievance procedures the question as to whether the action of Plaintiff's former employees in joining the strike called by Defendants and others in protest of Plaintiff's asserted unfair labor practices

in its dealings with the Southern Locals was a protected activity under the provisions of the National Labor Relations Act.

(f) The phrase "to submit" found in Article 9, Section 1 (h) of the Master Freight Agreement has reference to conduct that must be followed once grievance machinery has been set in motion and the benefits of Article 9 were not withdrawn as to the complaints filed April 30, 1963, by reason of the fact that the Defendants took strike action on June 11, 1962, and thereafter through April 1 1963, without first resorting to grievance machinery for determination of the complaint which was the subject of such strike action.

7. The Court is not now required to determine and does not now determine whether an award under the grievance machinery is binding and enforceable on the parties.

8. Plaintiff's appearance before the Joint Area Committee and the Joint Western Committee constituted a special appearance and did not constitute a general appearance.

9. The complaints of Defendants filed April 30, 1963, are subject to determination pursuant to the terms and provisions of Articles 8 and 9 of the Master Freight Agreement as herein interpretated and applied.

10. Plaintiff is not entitled to a judgment as prayed for in its complaint, or otherwise.

11. Defendants are entitled to take judgment against Plaintiff for their costs or suit incurred herein.

United States Court of Appeals

FOR THE NINTH CIRCUIT

NO. 20145

JOHN MARSHALL,

Appellant,

vs.

GRANT SAWYER, et al.,

Appellees.

BRIEF FOR APPELLEES

D. I. OPERATING CO.,
a Nevada Corporation;
ALLARD ROEN;
RUBY KOLOD;
DON BORAX;
ARTHUR OSTAP; and
J. G. MURRAY

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

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STATUTES

NO. 20145

IN THE

UNITED STATES COURT OF APPEALS

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BRIEF FOR APPELLEES

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J. G. MURRAY

JURISDICTION

The District Court had jurisdiction of the above entitled action by virtue of 28 USC 1332 (a) (1), 28 USC 1343 (3) and 42 USC 1983.

This Court has jurisdiction of the appeal under 28 USC 1291, 1294 (1) and 2107.

STATEMENT OF THE CASE

Facts

The pertinent facts are not in dispute except for some slight variation between the testimony of plaintiff and certain of the individual non-state defendants, consequently the non-state defendants will not attempt to summarize the facts at the beginning of this brief. They will be referred to later in discussion and argument.

QUESTIONS INVOLVED

1. Was plaintiff ousted by the non-state defendants from the hotel premises?

2. If there was an ousting of plaintiff, did this violate his civil rights?

3. If there was an ousting, did the non-state defendants act "under color of state law" so as to bring them within 42 USC 1983?

4. Plaintiff's complaint prayed for a money judgment only against the non-state defendants, but plaintiff did not offer evidence with respect to his damages. Should not the judgment be affirmed, on this ground alone, as to such defendants?

SUMMARY OF ARGUMENT

The non-state defendants in this brief will attempt to confine the discussion and argument to the issues which chiefly involve them. It appears to the non-state defendants that they might be termed incidental defendants for clearly the main issue is between plaintiff and the State defendants.

It is assumed that if plaintiff should not be successful in his appeal against the State defendants, it follows this Court must hold in favor of the non-state defendants. It is contended by the non-state defendants that even if plaintiff's appeal is successful against the State defendants, it does not follow that the trial court's

judgment should be reversed as to the non-state defendants. Whether or not the non-state defendants are correct in this assumption, they have chosen not to argue in this brief the Constitutional questions which involve plaintiff and the State defendants; however, in this connection, the non-state defendants hereby adopt the argument and conclusions of the State defendants set forth in their brief as an argument on behalf of the non-state defendants, rather than to take the time of this Court by presenting a similar discussion and argument in this brief.

The District Court in its Findings of Fact found that although plaintiff was requested to leave the hotel premises and drink service was refused him, he was assured no physical force would be used upon him and he would not be physically ejected from the Desert Inn Hotel. (Finding XLII). The Court also found that at no time was any physical force or violence visited upon plaintiff by the non-state defendants. (Finding XLIV). In Findings of Fact XLV, XLVI, XLVII and XLIX, the Court found that the non-state defendants had no choice in the matter, were coerced into compliance with the demands of the State Gaming Control Board and were subject to substantial duress and further would not have excluded plaintiff from the hotel premises or the bar operated therein but for the persuasion, duress and coercion of the State defendants.

The non-state defendants argue that based on the evidence and the above findings, there was no ouster of plaintiff and therefore no violation of his civil rights.

They further argue that although the District Court found as a fact that the action of the non-state defendants amounted to state action "under color of state law". (Finding XLVIII), this Finding is clearly based upon the above cited Findings which refer to the coercion put upon the non-state defendants by the State Gaming

Control Board. The non-state defendants argue that the fact they were coerced does not, from the standpoint of the law, put them in the position of having acted "under color of state law". They argue they are not within the provisions of 42 USC 1983, and, therefore, as to them regardless of the outcome as to the State defendants, the Judgment below should be affirmed.

Lastly, the non-state defendants argue plaintiff suffered no pecuniary damage whatsoever by reason of his inability to remain on the hotel premises. (Finding L). Plaintiff presented no evidence whatever on the subject of damages and the non-state defendants contend in the absence of anything in the record to support plaintiff's prayer for damages, there could be no judgment against the non-state defendants. In this respect it must be noted that plaintiff seeks a money judgment only from the non-state defendants (Appellant's Brief - Appendix B).

ARGUMENT

ALLEGED OUSTER - WERE PLAINTIFF'S CIVIL RIGHTS VIOLATED?

It is contended that under the clear undisputed facts there was no ousting of plaintiff from the hotel's premises. On page thirty-eight of Appellant's Opening Brief, the following statement is made: "Only because plaintiff submitted, was actual physical force not used against him. But the threat of force was there". This statement is completely contrary to the Findings of Fact of the trial Judge above cited. Also, there is nothing in the record at all which would support this observation.

The record shows only that a security officer was ordered to tell plaintiff in a nice way to please leave. "Go over there in a nice way and tell him to please

leave, that the place is lousy with agents from the Gambling Commission". (RT 189).

In connection with plaintiff's testimony as to having been requested to leave other establishments that same evening, there was nothing as to physical force or threatened physical force, and the application of common sense would make anyone know that unless force or the threat of physical force is absolutely required because of a necessity for restraint in order to protect others or the person himself, security officers in hotel establishments do not subject themselves to possible actions for assault and battery. Security officers acting in this manner, or threatening to act in this manner, would not long stay employed. Plaintiff contends he was ousted from the hotel premises because after he had two drinks of alcoholic beverages the cocktail waitress advised him that she could not serve him further, and he was requested by certain of the non-state defendants to leave. Mr. Kolod asked plaintiff whether he wanted the hotel to lose its license. Plaintiff answered no, that he did not want this to happen. Plaintiff then testified that after he was given certain names pursuant to his request, he proceeded to leave.

If these facts can be considered to be an ousting or eviction of plaintiff from the hotel premises, do they constitute a deprivation of any civil rights possessed by plaintiff, entitling plaintiff to a legal measure of damages? This alleged ousting, if it was an ousting, was by request, to which plaintiff acceded. In this respect, plaintiff acted like a gentleman. He said in effect that he did not want the hotel to jeopardize its gaming license by his staying on the premises, although he was not happy about the situation, because of the request to leave and because of the injury that could result to the hotel if he did not honor that request, he voluntarily, and of

his own free will, left the premises.

We quote the testimony of the plaintiff as follows:

"Q What did Mr. Kolod and Mr. Roen say?

A They said, 'Look now, you've just got to leave now. We know you. You know we don't mean any harm. These guys are driving us crazy here. They're all around here and threatening the license, they're picking up the cards and are just causing us a lot of trouble. Now, you don't want to do all that and make us maybe lose our license.' I says, 'No; I don't want to do that, but I don't want any of you guys throwing me out of here, either; you'd better not touch me, any of you.' So, they said, 'Oh, no, we won't lay a hand on you.' I said, 'Well, I want all the names of all these people that are asking me to leave and people that won't serve me.'

Q You told them you wanted the names?

A Yes, sir; I did.

Q What did they say?

A They said, 'Yes, we'll give you our names.' They said, 'We won't touch you, we won't throw you out bodily. If that's what you want, you want our names because you want to sue us then that's the way it'll have to be, but we're here to see that you go out.'

Q Did they give you the names?

A Yes, sir; they gave me their names and I wrote them down. I figures, well, I'll have those names when I see my attorney so I could start suit.'" (RT 208, 209).

In order that 42 USC 1983 be applicable to the non-state defendants, it is necessary that they were acting "under color of state law". Assuming for the purpose of argument only, that plaintiff was ousted from the hotel and that his civil rights were violated, it is contended that even so there is no cause of action in plaintiff's favor against the non-state defendants.

It has been held many times that the Fourteenth Amendment is not applicable to individuals, but only to States. This was the holding in the case of Shelley v. Kraemer (1947), 334 US 1-23, where it was said at Headnote 4:

> "Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3, the principle has become firmly embedded in our Constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

The same language was again quoted verbatim in the case of Williams v. Howard Johnson's Restaurant, 268 F. 845. The Court referred to sections 1 and 2 of the Civil Rights Act of 1875, which is the same as the section 1983 with which we are concerned, and then stated that the Fourteenth Amendment does not give any redress from the standpoint of a private individual against private conduct, however discriminatory or wrongful. In this case there was no State or local statute involved, as there is none involved in the case at bar.

The Fourteenth Amendment is the basis of the Civil Rights Acts. The prerequisites to liability under the Civil Rights Acts are:

1. That the defendant act under color of State or local law, and

2. The plaintiff be subjected to a deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States. Marland v. Heyse, 315 F.2d 312, (March 26, 1963, Tenth Circuit). In this case the defendant police officers arrested plaintiff on three occasions over a two year period without warrants and without charges ever being subsequently filed. The question was whether this was so arbitrary, unreasonable and without probable cause, as to subject plaintiff to a deprivation of rights guaranteed by the Constitution of the United States. The action was brought under section 1983 and 1985 (3). It was alleged that an individual by the name of Mrs. Frances Heyse had conspired with some of the defendant police officers to cause one of the arrests. The trial court granted a directed verdict to all defendants. The Tenth Circuit reversed to the police officers and affirmed as to Mrs. Heyse because all the police officers had acted "under color of state law"; however, in the case of Mrs. Heyse 'whatevershe may have done', she was not acting 'under color of state law', nor was there evidence of conspiracy, and the trial court therefore had properly granted her motion for a directed verdict.

In the case of United States v. Classic, 313 US 299-341 Mr. Justice Stone, who wrote the opinion, defined "under color of state law" as follows:

> "Misuse of power, possessed by virtue of State law, and made possible only because the wrongdoer is clothed with the authority of State law in action taken 'under color of state law.'"

The above view was reaffirmed in Screws v. United States, 325 US 91-161, and in Monroe v. Pape, 365 US 167.

In Screws, at page 111 the Court said:

"It is clear that 'under color of law' means 'under pretense of law'."

The question is asked by the non-state defendants as to where under the facts of the case at bar did they pretend they were acting under the law? Can it be contended that the "black book" was law, or that Mr. Abbaticchio's letter of March 29, 1960, concerning "black book distribution" (Plaintiff's Exhibit No. 3) was law? It seems that any contention such as this to the affirmative was disposed of by the Court in Marshall v. Sawyer, 301 F. 2d, 639, where the court said, commencing at page 644:

"In his complaint, summarized above, plaintiff does not attack the validity of any state statute. Nor does he attack the validity of any numbered regulations adopted by the Nevada Gaming Commission. He does, however, in addition to challenging certain conduct by individual defendants, attack the validity of the black book and the letter of March 29, 1960, which accompanied it, compiled, published, distributed and enforced as alleged. While the attack thereon is not expressly stated to be on constitutional grounds, this is the fair intendment of the complaint, as the appellees concede.

"The question, then, is whether this black book and the accompanying letter of March 29, 1960, compiled and distributed for the purposes and enforced in the manner alleged, constitute an administrative order of general application representing considered

state policy. If so, the single district judge was, in view of paragraphs 2281 and 2284, without jurisdiction to dismiss the action on the ground of abstention. Idlewild Bon Voyage Liquor Corporation v. Rohan, 2 Cir., 289 F. 2d 426, 429.

"This booklet and accompanying letter have some of the attributes of an administrative order of general application. According to the complaint, the booklet represented state policy and was distributed to all hotels in the state which operate gambling casinos. It was not limited in its effect to a particular and contemporaneous transaction, but extended to future activities at hotels all over the state. It was stated in the accompanying letter that the booklet would be 'revised and expanded' periodically, and recipients were advised to give effect to the information therein contained in order to avoid the possibility of license revocation.

"However, when the content of the booklet and letter are examined, it is seen that they are only informational, and advisory releases without any immediate operative effect as administrative orders. The booklet is limited to a recital of the findings made by the state agencies and officials concerning the alleged undesirable character of identified individuals. Insofar as it is described in the complaint, the booklet does not order licensees to do or refrain from doing, anything. The letter calls attention to the booklet and requests 'cooperation' in excluding the identified individuals

from their establishments. Neither the booklet nor the letter were promulgated in the manner prescribed by statute for administrative orders of general application. See N.R.S. Paragraph 463, 145, 150."

Comment may be made here that plaintiff has not contended in his brief that the black book and letter represented State law, and therefore it is assumed that nothing further need be said as to this, other than to comment that relating the facts of the case at bar to the definition in Classic, supra, the non-state defendants possessed no power by virtue of any State law, or, to state it another way, they were not clothed with any authority of State law. In fact, the testimony of Mr. Abbaticchio shows the contrary to be the case. Under cross-examination by Mr. Graves he said in effect that there had been no delegation of any authority to the non-state defendants, and that there was no attempt to clothe them with State authority. His testimony was solely to the effect that the cooperation of the licensees was requested in asking undesirables to leave the premises. (R.T. 449, 450).

The case of Hardyman v. Collins, 80 F. Supp. 501, is very much in point. The case was tried before Judge Yankwich in the Southern District of California. The court held that civil rights could not be impaired by wrongful acts of individuals, unsupported by State authority in the shape of laws, customs or judicial or executive proceedings. In this case there was an alleged conspiracy to interfere with meetings of a democratic club in Los Angeles, California, which was opposed to the "Marshall Plan." A motion to dismiss was granted as the Court held there could be no cause of action against private individuals for such interference.

The Ninth Circuit Court, 183 F. 2d 308, reversed the District Court. The

case was appealed to the Supreme Court, Collins v. Hardyman, 341 US 651, which in turn reversed the Ninth Circuit and agreed with the District Court. The Supreme Court stated that the complaint made no claim as to the conspiracy or the overt acts involving State officials or that defendants ever pretended to act under State law, and therefore under the Civil Rights Act there was no cause of action against individuals.

In Screws v. United States, supra, it was stated:

> "The problem is not whether State law has been violated, but whether the inhabitants of a State have been deprived of a Federal right by one who acts under color of State law."

To the same effect see Shematis v. Froemke, 189 F. 2d 963 (Seventh Circuit). In this case the action of the District Court in dismissing the complaint because it did not contain an allegation that the defendant acted or claimed to act under a color of law, and thus failed to state a cause of action for damages under the Civil Rights Act, was affirmed by the Seventh Circuit.

Also see Smith v. Jennings, 148 F. Supp. 641. In this case State convicts claimed witnesses who testified against them had testified falsely. It was held the defendants were acting as private citizens and not under color of any law or in any official capacity. This Court stated the law to the effect that the Constitution and Federal laws relating to civil rights do not afford protection against activities of private citizens not acting under color of law.

In Dinwiddie v. Brown, 30 F. 2d 465, the Court held that where State officials act wholly within their official responsibilities and do not intentionally cooperate in any fraudulent scheme, the resulting tort is not one committed by State

officials acting under color of State law, and the tort is solely that of the private individuals, the redress of which rests with the State courts.

The Civil Rights Act and Statute giving Federal District Court original jurisdiction of civil actions to redress deprivation of any right secured by the Federal Constitution, or Statute providing for equal rights of citizens or all persons within the jurisdiction of the United States under color of State law, are directed only to State action, and individuals' invasion of other individuals' rights is not within their purview. Oppenheimer v. Stilwell, 132 F. Supp. 761; Whittington v. Johnston, 102 F. Supp. 352; Moffett v. Commerce Trust, 87 F. Supp. 438.

The question of individual invasion of individual rights as coming within Section 1985, is summed up very well by our Supreme Court in the case of Burton v. Wilmington Parking Authority, 365 US 715. At page 721, the Court said:

> "The Civil Rights Cases, 1883, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835, 'embedded in our constitutional law' the principle 'that the action inhibited by the first section (Equal Protection Clause) of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' Chief Justice Vinson in Shelley v. Kraemer, 1958, 334 U.S. 1, 13, 68 S. Ct. 836, 842, 92 L. Ed. 1161. It was language in the opinion in the Civil Rights Cases, supra, that phrased the broad test of state responsibility under the Fourteenth Amendment, predicting its consequence upon 'State action of every kind... which denies... the equal protection of the laws.' At p. 11 of 109 U.S.,

at page 21 of 3 S. Ct. And only two Terms ago, some 75 years later, the same concept of state responsibility was interpreted as necessarily following upon 'state participation through any arrangement, management, funds or property.' Cooper v. Aaron, 1958, 358 U.S. 1, 4, 78 S. Ct. 1401, 1403, 3 L. Ed. 2d 5. It is clear, as it always has been since the Civil Rights Cases, supra, that 'Individual invasion of individual rights is not the subject-matter of the amendment,' 109 U.S. at page 11, 3 S. Ct. at page 21, and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it. Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' Kotch v. Board of River Port Pilot Com'rs., 330 U.S. 552, 556, 67 S. Ct. 910, 912, 91 L. Ed. 1093. Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."

Finally on this subject, we need go no further than the case of Marshall v. Sawyer, supra, which certainly must be considered the "law of the case", where the Court said at page 646:

> "The defendants' conduct was engaged in under color of state law if they were clothed with the authority of the state, and were purporting to act thereunder whether or not the conduct complained of was authorized or, indeed, even if it was proscribed by state law. Monroe v. Pape, 365 U.S. 167, 187, 81 S. Ct. 473, 5 L. Ed. 2d 492; Screws v. United States, 325 U.S. 91, 111, 65 S. Ct. 1031, 89 L. Ed. 1495. Whether there is 'color of state law' is a federal, not a state question. Were this not true, a state, acting through its legislature or courts, would have it within its power to immunize its agencies and officials from liability under the Civil Rights Act.
>
> "The second essential element in a Civil Rights Act damage case - conduct which deprives the plaintiff of a constitutional right - is also a question of federal law. The meaning or validity of state statutes or regulations is immaterial to the resolution of this question."

Circuit Judge Pope in his concurring opinion in Marshall v. Sawyer at page 650, said:

> "I have difficulty taking seriously the claim of $150,000 against the hotel for acts which, according to the complaint, came

about through 'coercion, intimidation and inducement' by the State officials, 'by threat of loss of license, upon the hotels of the State.' Jurisdiction here is predicated solely upon the Civil Rights Acts, Sections 1983...of Title 42 U.S.C.A. The first of these sections creates no cause of action against a private individual." (Emphasis added.)

CONCLUSION

For the reasons set forth above and apparent in the record, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

MADISON B. GRAVES, ESQ.
J. A. DONNELLEY, ESQ.

By /s/ J. A. DONNELLEY

Attorneys for the non-state defendants.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ J. A. DONNELLEY
Attorney

NO. 20145

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN MARSHALL,

Appellant,

vs.

GRANT SAWYER, et al.,

Appellees.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

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NO. 20145

IN THE

UNITED STATES COURT OF APPEALS

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Appellant,

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Appellees.

APPELLANT'S OPENING BRIEF

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

The District Court had jurisdiction under 28 U. S. C. 1332 (a) (1) [diversity of citizenship] and under the Federal Civil Rights Act (28 U. S. C. 1343 [3] and 42 U. S. C. 1983), this being an action for damages and for an injunction arising out of the action of the defendants in ousting plaintiff from, and preventing him from being on, any portion -- including the restaurant, sleeping accommodations, golf course, drugstore, swimming pool, etc. -- of any premise in the State of Nevada which also has on it a

portion licensed for gaming (Appx. B). [1]

This is an appeal from the judgment denying relief entered on April 1, 1965 (CT 190). Notice of Appeal was filed on April 26, 1965 (CT 204).

This Court has jurisdiction of the appeal under 28 U.S.C. 1291, 1294(1) and 2107.

STATEMENT OF THE CASE

Facts

The facts are essentially not in dispute.

At the end of 1959, the state defendants [2] were not pleased

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1/ This is the second time this case is before this Court, the previous appeal (No. 17322) having resulted in a reversal of the trial court's dismissal of the case on the ground of abstention (301 F. 2d 639). The record certified to this Court on this appeal consists of the Clerk's Transcript (CT) of all the proceedings in the trial court upon the remand, the Reporter's Transcript (RT) of the trial of the action on the remand and the Exhibits introduced and sought to be introduced at the trial. In accordance with Rule 18 (2) (f) of this Court, the list of exhibits is set out as Appendix A hereto. The Complaint and the Answer of the non-state defendants were not re-certified to this Court. They are present in the record on the previous appeal in No. 17322, pp. 1-13 and 26-26a, respectively. For the convenience of the Court and counsel, the complaint and said answer are reprinted as Appendix B and Appendix C, respectively, hereto.

2/ Unless otherwise noted,"defendants" in this memorandum refers to the State appellees, Grant Sawyer, Governor of Nevada, the Nevada Gaming Control Board and Gaming Control Commission and the respective members thereof. When the non-state defendants are referred to, they will be so noted, i.e., as the non-state defendants, they being the D. I. Operating Co., doing business and operating the Desert Inn Hotel in Las Vegas, Nevada and employees thereof (Appx. B).

(RT 38) that certain magazine articles, such as Exhibit 2 in evidence, 3/ stated that some of the persons who actually held gambling licenses in Nevada were "characters in the underworld or on the fringes of it. Graduates of the lawless prohibition days, many with criminal records," (Exh. 2, p. 139) "hoodlums," (ibid, p. 142) "the list of licensees . . . reads like a page out of a U. S. Senate investigation into the Cleveland underworld." (ibid, p. 143) "one time bootlegger and gambling figure," (ibid) "served a three-year term for tax evasion," (ibid) "ex-bootlegger and gambler" (ibid) "closely associated with an important member of the Capone gang." (ibid) To combat these statements as concerning actual licensees, 4/ "to protect the good name of the legal gambling industry in the State of Nevada and, of course, the State of Nevada itself," (RT 33) defendants (RT 33) hit upon the idea of picking out 11 men, putting their names, pictures, descriptions, FBI and C11 or KCPD number in a "black-book" (Exh. 1) and on March 29, 1960, advising the owners of the 12 major Las Vegas strip hotels and the Hotel Fremont in downtown Las Vegas (and later the other major

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3/ Characterized as to some parts of which by defendants as "exaggeration" (RT 476) or "inaccurate" (RT 128) or, as to the statement that $3 billion is gambled yearly in Nevada, as "nonsense" (RT 133).

4/ That licensees do have extensive police records (RT 59), are considered by defendants to have unsavory reputations such as defendants attribute to plaintiff (RT 66), "have a reputation of being a rum-runner in prohibition or a gambling racketeer or something like that" (RT 129), had a tax evasion conviction (RT 132) "some had a reputation of being connected with mobs" (RT 477) is conceded by defendants (references op. cit. this f. n. and RT 462, 479).

clubs in the Lake Tahoe-Reno area [RT 44, 45]) that the presence of these men in their establishment was to be prevented "in order to avoid the possibility of license revocation." (Exh. 3, RT 50). 5/

The book was compiled without "independent investigation of these people." (RT 36). Specifically, with regard to data received from the Chicago Crime Commission concerning plaintiff, defendants did not investigate and did not know whether the statements made therein were true (RT 37) or the sources reliable (ibid). The Chairman of the Gaming Commission, though he participated in the creation of the black book (RT 456) had no idea why plaintiff was included in it (RT 461).

The hotels, on the "premises" of which defendants decreed plaintiff may not be (RT 179), are large establishments, each of them covering many acres, all of them serving the public, including children, in the manner hotels in cities and resort areas normally do, and offering the usual non-gambling facilities such hotels do. See, generally, plaintiff's Exhibits 6A through 6H. The Desert Inn (Exh. 6B), for example, is typical. It has hotel rooms

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5/ Two of the defendants offered other reasons, without stating facts, for the compilation of the black-book and the orders of exclusion, such as "attempts of outside influences to infiltrate into the gaming industry" (RT 453, 458), "visitations of people who had reputations of being connected with organized crime mobs in various cities in the United States" (RT 471), this leading to a concern as to the "public image" (RT 472) that these persons "might be in some way organizing similar activities that they are accused of back wherever they came from" (RT 473), but it became clear on cross-examination that defendants had, and did, exercise, ample authority in the granting and refusal of licenses and had no problems concerning hidden interests (RT 460), that the real concern was publicity (RT 465, 475).

(RT 167), lobby (ibid), coffee shop (ibid), show room (ibid), lounges (ibid), swimming pool (ibid), golf course (ibid), concession stands (ibid), ladies' dress shop (ibid), men's shop (ibid), beauty shop (ibid), drug store (ibid), novelty shop (ibid), barber shop (ibid), upstairs room for dancing (ibid), a health club (RT 171). To go to such places as the swimming pool, the cigar stand, to register at the hotel, the health club, it is not necessary to go through the gambling casino (RT 168, 171). The shopping arcade is outside the main building (RT 167). The hotel holds golf tournaments that attract large numbers of people (RT 168). 6/ Rooms are rented to families with children (RT 168). Children are permitted anywhere on the hotel premises, including the shows, except the gaming casino, the slot machines and the bar (RT 169). Convention facilities are available (e.g., Exh. 6A).

The hotels are centers of public gatherings to which the public is invited for many purposes. See, generally Exhibits 7A through 7I. For example, the Desert Inn presents the "Tournament of Champions" (Exh. 6B) and the "Challenge Golf Series". A story in the Las Vegas Review Journal for September 18, 1963 (Exh. 7A, p. 24, cols. 1, 2, 3) announced:

> "The public is invited free to attend all three scheduled contests and tee off time has been set for 8 a.m."

The Chamanettes, a women's organization, had its convention at

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6/ Plaintiff plays golf (RT 203).

the Sahara Hotel (Exh. 7B, p. 14, cols. 4, 5).

The Thunderbird Hotel was the place selected for a press conference to announce plans for a "Disneyland" Fund Park in Las Vegas (Exh. 7C, p. 9, cols. 2-6).

The National Conference of Christians and Jews held its annual meeting banquet at the Virginia City Room of the Thunderbird Hotel on September 26, 1963. The public was invited. The Hon. Howard W. Cannon, United States Senator gave the address (Exh. 7D, p. 7, col. 102; p. 20, cols. 7-8).

The Las Vegas Chapter of the American Institute of Banking met in the International Room of the Stardust Hotel on September 7, 1963 (Exh. 7F, p. 12, col. 3). The National Society of Public Accountants held a meeting at the Flamingo Hotel during the week of August 22, 1963 (Exh. 7G, p. 8, col. 5). And the Saints and Sinners, well known organization to assist charities involving children, held its organizing meeting in the Thunderbird Hotel's Virginia City Room on August 25, 1963 (Exh. 7H, p. 5, col. 3).

Mortimer Caplin, United States Commissioner of Internal Revenue, gave a talk sponsored by the Las Vegas Men's Club, which was open to the public, at a dinner banquet at the Thunderbird Hotel on August 21, 1963.

And, of course, the various shows given by the hotels advertise and invite the public to attend (Exh. 7D, p. 9, col. 4; p. 10, col. 8,; p. 28; Exh. 7E, p. 2, cols. 5-8; p. 5, cols. 1, 2; p. 7, cols. 3-4, 7-8; p. 9, cols. 7-8; p. 11, cols. 2, 8; p. 14, cols. 3-6).

Despite all this public, non-gambling, activity that goes on, defendants, speaking as and for the State of Nevada, insist that plaintiff cannot step foot, not one inch, on the property. This includes going to the coffee shop (RT 72), the swimming pool (ibid), registering at the hotel (ibid), going to the golf course (ibid), seeing a show (ibid). The asserted prohibition ordained by defendants also includes plaintiff's not having lunch or dinner at one of the hotels with his attorneys while he was litigating this case before the trial court (Cf. RT 242-244).

Plaintiff had lived in Las Vegas for about four years during the 1950's (RT 194). He engaged in business there (ibid), bought land there (RT 196) and still owns some of it (ibid). He has had occasion to return to Las Vegas on business on numerous occasions (RT 196), some of which were concerned with litigation over the property, including the taking of depositions (RT 213-214).

In October of 1960, plaintiff had to come to Las Vegas on business and he registered at the Tropicana Hotel (RT 198). While there, representatives of the hotel came to him, told him he was in the black-book, asked him to leave and told him that if he did not, they would lose their license (RT 199). On another occasion, while at the Tropicana, his services were curtailed, and so for that reason he left (RT 200). 7/

7/ This curtailment of services was in accordance with a suggestion made by defendants when they were handing out the black book and letter (RT 48, 49, 79) together "with an implied threat of formal action" as to suspension or revocation of license should the licensees "fail to make proper efforts to comply with the state's request for cooperation" (RT 50).

That week, wherever plaintiff went, he was asked to leave because of the pressure from defendants (RT 200, 201, 202, 204, 206, 78). In consultation with the defendant Governor, defendant Keefer and defendant Turner, it was decided that, for the first time in this manner (RT 161), defendants "would institute an examination of dice and cards to include the hotels, or most of them, that had been catering to" plaintiff (RT 81-82). This, so that the hotels "will get the message" (RT 84). This was done with a battery of 18 or 20 Gaming Board agents going into the pits to make this "routine examination of their dice and cards" (RT 85). This was done twice during that week (RT 86) and in addition, on the second occasion, the dealers and pit bosses were asked to show their work cards (RT 87). This "checking" was done at the Desert Inn, the agents coming in "like gangbusters" (RT 181), or, as described by the Attorney General of the State of Nevada, by the use of "muscle" (RT 445), was detrimental and did not look good to the customers (RT 160), but the non-state defendants "got the message".

The next night, October 28, 1963, plaintiff came in to the Desert Inn, sat in a booth in the lounge where there is no gambling of any kind (RT 162). Because they feared loss of their licenses, and the presence of defendants' agents (RT 189, 206, 210), the non-state defendants, Roen and Kolod, and their employees Borax and Murray required plaintiff to leave (RT 163, 164, 165, 183, 189, 207) which he did, under protest and against his will (RT 164, 207, 208). All this was done in public, in the presence of large numbers of persons (RT 165, plaintiff's Exh. 4 and 5); the foyer was

crowded, the show just having ended, people were going in and out in droves (RT 92).

Although none of the non-state defendants actually physically put his hand on plaintiff, it is perfectly clear from the situation that had plaintiff not taken the peaceful way out, the presence and participation of the security officers (RT 187, 189) posed an ever present physical threat.

At no time was any of plaintiff's conduct objectionable to either the non-state (RT 166, 173, 183, 185, 191, 192) or the state (RT 98, 118, 121) defendants. He was not boisterous, had created no disturbance and had conducted and behaved himself properly at all times (ibid). Indeed, the defendants are not concerned with plaintiff's conduct at all (RT 121).

Following his ejection from the Desert Inn, plaintiff went to the Sahara Hotel where he met some friends at the bar (RT 211), started to have a drink with them and was again told to leave because the Gaming Control men were there and plaintiff was in the black-book (RT 211-212).

At a later date plaintiff was required to be back in Las Vegas to give a deposition in connection with the litigation of his property (RT 213-214), was in his room at the Dunes Hotel late at night (RT 118, 212) when a representative of the hotel came to his room, knocked on the door and told him to leave because otherwise, they, the hotel, would lose their license (RT 213). Picturesquely, Mr. Weiman of the Dunes Hotel, said (RT 213): "Be my guest somewhere else, but please get out of here."

that that would be all right (ibid).

But it was not all right with the defendants. During the very performance, so insistent were the Gaming Control Board members, that Mr. Sims was compelled to go over to plaintiff, in the theatre, and ask him to leave (ibid). When plaintiff told Mr. Sims that he was going to watch the show and then leave, Mr. Sims advised that Mr. Lippold, the Gaming Control Board member, was sitting right there watching them, and was going to watch Sims escort plaintiff to the door, which he did (RT 216). The Gaming Control Board members, including the Chairman, knew that plaintiff was with his wife and niece (RT 121) and here, again, no complaint of any impropriety on the part of Marshall was made (ibid).

QUESTION INVOLVED

May a state, consistent with the due process, equal protection and privileges and immunities guarantees of the Fourteenth Amendment to the United States Constitution and with the Bill of Attainder Clause (Art. I, §10, cl. 1) of the Constitution, without any showing of necessity therefor and without any showing that less drastic, more precise methods would not combat the supposed evil sought to be reached, completely, and by name, ban a United States citizen from the entire premises of a business establishment with many accommodations open to the public, only one portion of which is licensed for gaming, on the ground that said person is a person of notorious or unsavory reputation?

SPECIFICATION OF ERRORS

1. The Trial Court erred in giving judgment to the defendants and in failing to give judgment to the plaintiff.

2. The Trial Court erred in finding (CT 187, Par. L) that "plaintiff suffered no pecuniary damage whatever by reason of his inability to remain in any hotel, bar or restaurant where there was no (sic) licensed gaming in the State of Nevada."

This is obviously a typographical error. The finding was undoubtedly meant to read "where there was licensed gaming, etc.". So read, the finding is not supported by the evidence, for the evidence is clear that plaintiff was ousted from and is not permitted to be at any part of such establishment in the State of Nevada. Accordingly, he has suffered and is suffering pecuniary damage.

3. The Trial Court erred in finding that

a. (CT 188, Par. LIV) "The state defendants acted reasonably in their classification of plaintiff as an undesirable person who should be excluded from gaming establishments in the State of Nevada", and

b. (CT 188, Par. LV) "The action of the state defendants in causing and coercing the non-state defendants to exclude plaintiff from the entire premises wherein gaming was permitted and licensed pursuant to the laws of the State of Nevada, and not merely from the gaming area of such premises, was necessary in order to achieve effective enforcement of the Nevada

Gaming Control Act and of the regulations of the Nevada Gaming Commission and the State Gaming Control Board."

By the words "gaming establishment" in Finding LIV, appellant understands the meaning to be: from any portion of the premises on which there is licensed gaming, as distinguished from the portion where licensed gaming is going on. For that is what this case is all about, as Finding LV at least recognizes. Appellant is not here contesting for the right to gamble nor for the right even to be in the gaming area. So understood, there is no evidence in the record of this case which will support a finding of reasonableness on the part of the defendants nor any showing of necessity to achieve effective enforcement of the Nevada Gaming Control Act nor of the regulations of the Nevada Gaming Commission or State Gaming Control Board. On the contrary, the evidence shows arbitrariness on the part of defendants and, what is perhaps more important, violation by defendants of plaintiff's constitutional rights. Violation of constitutional rights cannot be said to be reasonable nor must it give way to administrative expediency.

4. The Trial Court erred in all of its conclusions of law (CT 188-189).

This is, of course, but another way of saying, as in Specification of Error Number 1, supra, that the Court erred in giving judgment for defendants. That is to say, the classification of plaintiff to be excluded from the entire premises was an unreasonable and invalid exercise of the police power (Conclusion I, CT 188), the preparation and circulation of the "Black Book"

without notice or opportunity to be heard did deny due process, indeed, it was also a Bill of Attainder (Conclusion II, CT 188), the state defendants are liable to plaintiff for preparing and circulating the "Black Book" and in connection with the classification of plaintiff as an undesirable person to be excluded from the entire premises on one part of which gaming is licensed (Conclusion III, CT 189), both the state and non-state defendants are liable to plaintiff for refusing service in, and in excluding plaintiff from, the premises of the Desert Inn Hotel (Conclusion IV, CT 189). Plaintiff was deprived of rights, privileges and immunities secured to him by the Constitution by the actions of the state and non-state defendants (Conclusion V, CT 189), plaintiff was subject to an unreasonable search and seizure and deprived of rights guaranteed him by the Fourth Amendment to the Constitution (Conclusion VI, CT 189) and plaintiff was damaged by reason of the facts alleged in the complaint and proved at trial (Conclusion VII, CT 189).

ARGUMENT

Summary of Argument

In his argument, plaintiff points out that this is not a gambling case, that defendants by their conduct have excluded and continue to exclude plaintiff from places of public accommodation not because of any misconduct of plaintiff, but solely because of plaintiff's alleged notorious and unsavory reputation by reason of which defendants consider plaintiff to be an undesirable person to be served and

treated as others are. Plaintiff urges that this is a violation of his rights of due process of law and to the equal protection of the laws.

He urges that if he is or has been guilty of violation of law, he may be charged and tried therefor -- that due process requires no less -- but that for the State to decree where a citizen may obtain the ordinary necessities of life, such as where he may eat and where he may sleep, is beyond the power of the State, and that in any event defendants' conduct is unconstitutional on the ground of overbroadness; that when personal liberty is being curtailed by the State, precision is the touchstone of permissible action and that here defendants have gone far beyond any necessity. Plaintiff argues that the right to freedom of movement is a privilege and immunity of a citizen of the United States, and includes the right of access to places of public accommodation which cannot be impaired by the State, at least without evidence of abuse by the citizen of that privilege.

Plaintiff points out that he is not seeking a license from the State to conduct gambling, nor to gamble nor even to be at a place where gambling is conducted; that simply because gambling is conducted at other parts of the public premises is no justification for defendants' arbitrary conduct.

Plaintiff contends that this Court's opinion when this case was previously here on appeal (#17322; 301 F. 2d 639) supports him in his claim and that the proof which in the eyes of even the concurring justice would sustain defendants' conduct (301 F. 2d at 647-654) was not adduced by the defendants.

Plaintiff further argues that the listing by the State of plaintiff in a "black-book" as an undesirable without notice or hearing violates fundamental due process and also is, or is akin to, a Bill of Attainder.

He urges that the freedom from unreasonable search and seizure guarantee of the Fourth Amendment includes the right to be let alone by State authority unless the individual is engaged in misconduct, which defendants themselves concede he was not.

Finally, plaintiff urges that he was entitled to damages for, and injunction against, defendants' conduct and that the trial court's judgment in denying all relief to him should be reversed.

Preliminary Statement

It is often helpful in the decision of a matter to have clearly in mind what is not involved. The instant case is no exception.

This is not a gambling case.

The case is not concerned with the right to gamble, nor with the right to be a licensee and operate a gambling establishment nor even with the right to be present at a gambling device; it just does not concern gambling at all. Whatever may be the right of defendants to say who shall and who shall not have licenses to conduct gambling in the State, or their right, if any, to determine who among the citizenry may be permitted to gamble, or the right, if any, to say who among the populace may be permitted to be at a gambling device though not participating in gambling, have nothing to do with this case.

Indeed, even aside from the fact that the evidence adduced at the trial was not concerned with gambling, the very instructions issued by defendants, both written and oral, made clear that gambling was not involved and that not even defendants considered it to be. For example, the March 29, 1960 letter of instruction (Exh. 3) states:

> "These individuals are known to visit the Las Vegas area on occasion and usually obtain accommodations at various strip establishments.
>
> "In order to avoid the possibility of license revocation for 'unsuitable manner of operation', your

immediate cooperation is requested in preventing the presence in any licensed establishment. . . . " (emphasis added).

We repeat: the case does not involve gambling. What it does involve is the right to be let alone, "the most comprehensive of rights and the right most valued by civilized men." (Mr. Justice Brandeis, dissenting, in Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. ed. 94). It involves the simple right just to be and to live -- including the obtaining of the basic human needs of food, to rest at night when one is in town to give one's deposition in a court case, to go, if necessary to the men's room, or, yes, if you will, to take one's wife and niece to a show when they are on vacation, or to play golf or view a tournament.

While, from their conduct, it appears that defendants regard lightly the dignity of the individual and the right to be treated as a human being, this Court is not so callous. Cf. its decision in York v. Story, 324 F. 2d 450 (CA 9 1963 - pet. for writ of cert. den. 376 U.S. 939, 84 S. Ct. 794, 11 L. ed. 2d 659); and see Cohen v. Morris, 300 F. 2d 24 (CA 9 1962).

It is interesting to note that as to licensees, over whom defendants do have some control, defendants are of the view that they "cannot act arbitrarily or capriciously," (RT 131) and that the licensees must be given "a day in court, so to speak." (RT 454). But defendants have no such reservations as to the citizenry over whom "neither the Commission nor the Board has any jurisdiction."

(RT 46).

Defendants concede (RT 345, 349, 350) that the defendant, Governor Sawyer, did publicly state as to the events described in the factual statement above, and presumably meant it when he said it (Exh. 8):

> " . . .
>
> " 'I agree with any measures necessary to keep the hoodlums out of Nevada.' . . . 'The operators have a responsibility to cooperate.'
>
> " . . .
>
> " 'We might as well serve notice on underworld characters right now they are not welcome in Nevada and we aren't going to have them here.' . . . "

It is true that defendants now concede (RT 21, 71) they have no right to keep plaintiff out of the State entirely. But they stoutly insist that they have the right to keep him out of parts of the State -- parts which are open for public accommodation and parts which have nothing to do with gambling. The purported distinction is without a difference.

I

WHEN A STATE OUSTS A CITIZEN, OR CAUSES HIM TO BE OUSTED, FROM A PRIVATELY OWNED BUSINESS WHICH IS OPEN TO THE PUBLIC, WHEN THAT CITIZEN IS CONDUCTING HIMSELF PEACEFULLY AND PROPERLY, THE STATE VIOLATES DUE PROCESS AND DENIES EQUAL PROTECTION OF THE LAWS.

It will perhaps help to set this case in proper perspective to consider that the issues in the case are the same as though this were a criminal prosecution against Mr. Marshall for trespass. That is, had plaintiff here not left the premises, but continued to sit in the Desert Inn lounge requesting service and not getting it. What then? If defendants have the authority they assert and the plaintiff having refused to leave private property when asked to do so, as here, then presumably plaintiff would be guilty of trespass or, as is sometimes charged, disturbing the peace, disorderly conduct or like crimes, and could be arrested and prosecuted therefor. But could he, legally? Recent Supreme Court decisions in some "sit-in" cases give the answer, and the answer is "no".

In Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L. ed. 2d 207, the defendants, Negroes, were convicted in the Louisiana state courts of disturbance of the peace when they sat quietly at lunch counters, requested service and refused to move when told that the counters where they were to be served were across the hall and for them to move there where they would be served. Louisiana statutes required the separation of the races

in the service of food in public places. The United States Supreme Court reversed the convictions, holding that there was no evidence to support a finding of disturbance of the peace, therefore the convictions violated due process of law. Cf. Boynton v. Virginia, 364 U.S. 454, 81 S. Ct. 182, 5 L. ed. 2d 206, reversal of conviction for remaining without authority of law upon premises after having been forbidden to do so.

In Peterson v. City of Greenville, 373 U.S. 244, 83 S. Ct. 1119, 10 L. ed. 2d 323, the State convictions were for trespass when Negroes refused to leave a lunch counter after the owner told them the counter was closed and requested everyone to leave. The ordinance here, too, required the operator of the premises not to serve the races in the same room. Here again the Supreme Court reversed by reason of the Fourteenth Amendment. To the same effect: Gober v. City of Birmingham, 373 U.S. 374, 83 S. Ct. 1311, 10 L. ed. 2d 419 and Avent v. North Carolina, 373 U.S. 375, 83 S. Ct. 1311, 10 L. ed. 2d 420.

In Lombard v. Louisiana, 373 U.S. 267, 83 S. Ct. 1122, 10 L. ed. 2d 338, the petitioners were both White and Negro. They were convicted in the State courts for violation of the Criminal Mischief Statute which makes it a crime to refuse to leave a place of business after being ordered to do so by the person in charge of the premises. There was no statute nor ordinance requiring racial segregation but the Mayor and Superintendent of Police had issued statements such as (p. 270), "We wish to urge the parents of both white and Negro students who participated in today's sit-in

demonstrations to urge upon these young people that such actions are not in the community interest," and (p. 271) "It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demonstrations cease and that henceforth they be prohibited by the police department." Pursuant to such exhortations the proprietor had asked the students to leave the counter where they were and to go to the counter at the back of the store where they would be served. Upon their refusal, the arrests and convictions resulted. The Supreme Court reversed under the Fourteenth Amendment.

Similarly, we submit, could defendant not have been prosecuted for trespass, disturbance of the peace, malicious mischief, etc., had he refused to leave. The fact that plaintiff did not resort to self help but turned instead to the courts for vindication of his constitutional rights should, and does not, make any difference. In either event, he is entitled to protection. Cf. concurring opinion of Mr. Justice Goldberg, joined by the Chief Justice and by Mr. Justice Douglas, in Bell v. Maryland, 378 U.S. 226, 286, 293-294, 304, 84 S. Ct. 1814, 12 L. ed. 2d 822, in which it is said (at page 317 of 378 U.S.): "The constitutional right of all Americans to be treated as equal members of the community with respect to public accommodations is a civil right granted by the people in the Constitution -- a right which 'is too important in our free society to be stripped of judicial protection'." See also, Mr. Justice Black dissenting in Bell v. Maryland, 378 U.S. 226, 346, 84 S. Ct. 1814, 12 L. ed. 2d 822, 867.

II

PLAINTIFF'S RIGHTS UNDER THE FOURTEENTH AMENDMENT WERE VIOLATED AND ARE BEING VIOLATED.

The decision by this Court when this case was previously before it (301 F. 2d 639) establishes, we submit, plaintiff's right to judgment. The proof adduced at trial was just as alleged in the complaint. For the sake of completeness, however, we discuss the matter more.

A. Defendants Denied and Are Denying Plaintiff Substantive Due Process.

It has been noted above under Point I that the concept "Get out of here; you can't eat here; go over there where you will be served", is no answer to the claim that the citizen's rights are being denied him when refusal is made at the place he wants and is entitled to be. Such conduct by the State or such conduct by private persons under the aegis of the state denies, in the context of the case at bar, the fundamental right to freedom of movement. It is banishment, albeit not to Siberia nor from a whole state. However the principle is the same and the State has no power to so decree. Who is the State to tell the citizen where he shall eat his dinner?

Summary exile or banishment as a means of the conduct of official public business has a long and infamous history. Relief

against it was one of the concessions won by the "freemen" against King John in the Magna Carta (Article 39). 8/ Today, it is barred by Article 9 of the Universal Declaration of Human Rights. 9/ In Mr. Justice Douglas' book, "An Almanac of Liberty" (Doubleday & Co., N.Y. 1954), he reminds (p. 73) that

> " . . . It was practiced in America during the colonial period. In Russia, exile to Siberia has long been a form of sentence, following conviction for a political or other crime. Other countries of Asia have used banishment as a means of getting rid of 'troublesome' or 'undesirable' people. . . . "

In Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S. Ct. 1138, 92 L. ed. 1478, the Supreme Court struck down the California statute which forbade alien Japanese from getting a commercial fishing license. During the course of its opinion, it referred to Truax v. Raich, 239 U.S. 33, 36 S. Ct. 7, 60 L. ed. 131, and said that that decision stood for the proposition that an alien, lawfully in this country, "had a federal privilege to enter and abide in 'any state in the Union' " (334 U.S. at 415). In the Truax case itself which struck down an Arizona statute requiring Arizona employers to hire a certain percentage of native-born

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8/ "No freeman shall be . . . banished . . . unless by the judgment of his peers, or by the law of the land."

9/ "No one shall be subjected to arbitrary arrest, detention or exile."

persons, the Court said (239 U.S. 33, 42):

> " . . . The assertion of an authority to deny aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode . . . and if such a policy were permissible, the practical result would be that those lawfully admitted to the country . . . , instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality. "

How much more clear, therefore, the invalidity of defendant's conduct in this case where plaintiff is a citizen. 10/

In Edwards v. California, 314 U.S. 160, 62 S.Ct. 164, 86 L.ed. 119, California sought to put a restriction upon those who could come into the State. The Supreme Court said this could not be done. Mr. Justice Jackson's concurring opinion recognized (314 U.S. at 178) that the right to move freely within the United States is an incident of national citizenship protected against interference by the privileges and immunities clause of the Fourteenth Amendment. Mr. Justice Douglas' concurring opinion stated (314

10/ Cf. Mr. Justice Jackson, concurring, in Edwards v. California, 314 U.S. 160, 182, 62 S.Ct. 164, 86 L.ed. 119:

> " . . . The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship, which sent the centurion scurrying to his higher-ups with the message: 'Take heed what thou doest: for this man is a Roman' . . . "

U.S. at 181) "that the right of free ingress and egress rises to a higher constitutional dignity than that afforded by state citizenship." See also Crandall v. Nevada, 6 Wall. (U.S.) 35, 18 L.ed. 745; Williams v. Fears, 179 U.S. 270, 274, 21 S.Ct. 128, 45 L.ed. 186:

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution."

See also:

> Chafee, Three Human Rights in the Constitution, 162, 193 (1956).

The effect of defendants' conduct here is, of course, to unwarrantedly and arbitrarily restrict, impede and impair plaintiff's right to move in and about the state. In Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.ed.2d 1204, and Dayton v. Dulles, 357 U.S. 144, 78 S.Ct. 1127, 2 L.ed.2d 1221, the Supreme Court held that the right to travel is a basic right of the citizen, embodied, again, in the basic concept of liberty, protected by the due process clause even in the face of a claim under national security. Thus the court said in Kent (357 U.S. at 125-126):

> "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the

due process of law of the Fifth Amendment. . . . In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. Chafee, Three Human Rights in the Constitution (1956), 171-181, 187 et seq., shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. . . . "

This being so, the conduct of the defendants as shown by the evidence in this case is indefensible and plaintiff is entitled to the protection of the Courts.

"The same principle which prohibits the banishment of a criminal from a State or from the United States applies with equal force to a county or city. The old Roman custom of ostracizing a citizen has not been adopted in the United States. The so-called 'floating sentence', so frequently resorted to in some inferior courts, falls in the same category. There is no statute in California authorizing such judgments. "

In re Scarborough, 76 Cal. App. 2d 648, 650,

173 P. 2d 825.

See also:

People v. Blakeman, 170 Cal. App. 2d 596, 597, 339 P. 2d 202;

People v. Lopez, 81 Cal. App. 199, 203, 253 Pac. 169 (Court declared void that part of a sentence ordering deportation of defendant, and noted that Attorney-General "concedes that there is no authority of law by which the State courts can make a valid order of this character.").

If judicial orders of banishment or deportation of convicted criminals are prohibited and there is no authority of law for such actions, a fortiori, there is even less sanction for state officials, acting under color of their authority, from by their own ipse dixit decreeing that certain persons may go here, but they may not go there. And this, even though the standard of state official conduct is that a particular person is "undesirable". Outlawry is no part of the American system.

In American Steel and Wire Co. of N. J. v. Davis, 291 Fed. 800 (ND Ohio 1919), municipal police officers arrested persons from outside the city who came to work at a plant which was on strike. The defendants defended on the ground that this was simply "detaining for investigation" and that if as a result of the investigation no violation of law was found, the persons so "detained" were released. The court did not permit such an argument to prevent

it from protecting a citizen's constitutional right to peacefully come into a city and seek work. Said the Court (291 Fed. at 804):

> "To deny any such person that right because he does not live in Cleveland would be to abridge or deny to such persons privileges and immunities belonging to every citizen of the United States and protected by its Constitution from a denial or abridgment by any state. . . . The power to preserve the public peace and to arrest and prosecute persons for crime cannot be made to support action depriving persons of these constitutional rights and privileges:

See also:

Hague v. C. I. O., 307 U.S. 496, 59 S.Ct. 954, 83 L.ed. 1423;

Beeler v. Smith, 40 F.Supp. 139 (SD Ky. 1941);

Kenyon v. City of Chicopee, 320 Mass. 528, 70 N.E. 2d 241.

The decree in the Hague case, supra, affirmed by the Supreme Court was "addressed to interference with liberty of the person or to the conspiracy to deport, exclude and interfere bodily with the respondents in pursuit of their peaceable activities." (307 U.S. at 517). Plaintiff is entitled to similar protection here.

At 11 Am. Jur., Constitutional Law, §329, p. 1135, it is said:

> "Personal liberty largely consists of the right

of locomotion -- to go where and when one pleases -- only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. The right of a citizen to travel upon the public highways and to transport his property thereon, by horse-drawn carriage, wagon, or automobile, is not a mere privilege which may be permitted or prohibited at will, but a common right which he has under his right to life, liberty, and the pursuit of happiness. Under this constitutional guaranty one may, therefore, under normal conditions, travel at his inclination along the public highways or in public places, and while conducting himself in an orderly and decent manner, neither interfering with nor disturbing another's rights, he will be protected, not only in his person, but in his safe conduct." (emphasis added).

In the Dred Scott case (Scott v. Sandford, 19 How (U.S.) 393, 15 L.ed. 691) which has never been judicially overruled [11/] in explaining why the Negro could not be a citizen, the Court pointed out what the rights of citizenship meant (15 L.ed. at 705):

". . . It would give to persons of the negro race, who were recognized as citizens in any one

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11/ The Civil War and the 13th, 14th and 15th Amendments only attempted to give to the Negro the citizenship rights the Dred Scott case said the white man always had.

State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; . . . " (emphasis added).

In denying, or attempting to deny, to plaintiff these rights, defendants, therefore, violate plaintiff's right to substantive due process of law.

B. The Listing By Defendants of Plaintiff In The Black Book Without a Hearing or Opportunity to be Heard Denies to Plaintiff Procedural Due Process and is a Bill of Attainder.

Such conduct by defendants, designed to and resulting in harm to plaintiff by causing his being refused accommodations and service and being ejected from places though he be not engaging in any improper conduct, in addition to being a denial under the due process clause of the Fourteenth Amendment, is likewise a Bill of Attainder in direct violation of Article I, §10, cl. 1 of the Constitution (No State shall . . . pass any Bill of Attainder . . . ").

This is precisely the kind of publication which is not permitted. While the designation is not a bill of attainder in the

traditional sense because not done by a legislature, it certainly possesses all the vices at which the Constitutional prohibition was aimed. In United States v. Lovett, 328 U.S. 303, 66 S. Ct. 1073, 90 L. ed. 1252, Congress passed a bill prohibiting the future payment of the salary of three named persons on the ground they were "subversives". The Court struck the legislation down, saying (328 U.S. at 315):

> " . . . [L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. . . . "

Defendants have done precisely that here. See also, United States v. Brown, 381 U.S. 43, 85 S. Ct. ___, 14 L. ed. 2d 484, holding unconstitutional as a Bill of Attainder, that provision of the Landrum-Griffin Act (29 U.S.C. 504 [1958 Ed. Supp. IV], 73 Stat. 519, 536) which prevented a member of the Communist Party from holding union office. That decision affirmed the holding of this Court (334 F. 2d 488 [1964]) likewise invalidating the section, but on First and Fifth Amendment grounds.

The fact that the action here was not by members of the legislature, but by members of the executive and administrative branch of the government is of no moment. In Joint Anti-Fascist Refugee v. McGrath, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817, the Attorney General, pursuant to a Presidential Executive Order,

listed and designated, without notice, hearing or opportunity to be heard, certain organizations, membership in which would be evidence to support denial or discharge from government employment. The Supreme Court struck this action down. Mr. Justice Black, concurring, summed the matter up when he said (341 U.S. at 143):

> "Assuming, though I deny, that the Constitution permits the executive officially to determine, list and publicize individuals and groups as traitors and public enemies, I agree with Mr. Justice Frankfurter that the Due Process Clause of the Fifth Amendment would bar such condemnation without notice and a fair hearing. . . . "

The right to notice, an opportunity to be heard and a fair hearing is basic. It goes to the very root and basic tradition of the concept of due process of law. It seems almost demeaning to have to remind ourselves of the principle. And yet, of course, constant reminder is necessary because, unfortunately, in fact, the principle is constantly being forgotten or ignored, as here, requiring court action for rectification. In Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.ed.2d 1377, the Supreme Court struck down administrative action which had designated an individual as a "security risk" without his being given the right to confrontation. The Court said (360 U.S. at 496):

> "Certain principles have remained relatively

immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases (citing cases), but also in all types of cases where administrative and regulatory action were under scrutiny. (Citing cases.) Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. Joint Anti-Fascist Committee v. McGrath,

341 U.S. 168 - 169 (concurring opinion)."

In Parker v. Lester, 227 F. 2d 708 (1955), this Court said (p. 716):

"... When it is proposed to take from a citizen through administrative proceedings some right which he otherwise would have, it has always been held that the constitutional requirement is that he shall be afforded notice and an opportunity to be heard. ..."

And in Morgan v. United States, 304 U.S. 1, 18, 58 S. Ct. 773, 999, 82 L. ed. 1129, it was said:

"... The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

In Holden v. Hardy, 169 U.S. 366, 389-390, 18 S. Ct. 383,

42 L. ed. 780, the language was:

> " . . . This Court has never attempted to define with precision the words 'due process of law', nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

And in Hovey v. Elliott, 167 U.S. 409, 417, 17 S. Ct. 841, 42 L. ed. 215:

> " . . . Can it be doubted that due process of law signifies a right to be heard in one's defense? . . . "

We will not belabor the point. We believe that defendants' designation of plaintiff as an "undesirable" without notice or opportunity to be heard and a fair hearing falls so far outside the pale of permissible executive 12/ or administrative conduct as to require no

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12/ The fact that one of the defendants is the Governor of the State does not prevent plaintiff from getting relief against him. Such precise relief was given by the federal district court in Sterling v. Constantin, 287 U.S. 378, 53 S. Ct. 190, 77 L. ed. 375, against the Governor of Texas and in recent litigation concerning the New Orleans schools, the Governor of Louisiana was enjoined by the federal district court and this action was upheld by the Supreme Court (Williams v. Davis, 364 U.S. 500, 81 S. Ct. 260, 5 L. ed. 2d 245).

further exposition, save, perhaps to say this: Defendants believe plaintiff is "undesirable". But this, of course, is no justification, nor will the Courts permit it. "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. . . . No higher duty, no more solemn responsibility rests upon this Court, than that of translating into living law and maintaining this constitutional shield (due process of law) deliberately planned and inscribed for the benefit of every human being subject to our Constitution -- of whatever race, creed or persuasion." (Chambers v. Florida, 309 U.S. 227, 241, 60 S. Ct. 472, 84 L. ed. 716; parentheses added).

This judicial duty is constantly being performed. The Court of Appeals for the Second Circuit in the so-called "Apalachin Case", albeit "the persuasive innuendo throughout the case that this was a gathering of bad men for an evil purpose", refused to permit a conviction to stand through the use of "crash methods". (United States v. Bufalino, 285 F. 2d 408, 415, 420 [1960]).

In Gros v. United States, 136 F. 2d 878, 880 (1943), this Court said that law enforcement agents may not act "like the Gestapo". To the same general view is the noteworthy opinion (although dissenting on the merits) of Justice Frankfurter in Davis v. United States, 328 U.S. 582, 597, 66 S. Ct. 1256, 90 L. ed. 1453:

> ". . . It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make

light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end."

See, also,

United States v. Seeger, 303 F. 2d 478, 452 (CA 2 1962);

Bridges v. United States, 184 F. 2d 881, 887 (CA 9 1950).

Fundamental rights have thus been denied plaintiff to his damage.

C. Plaintiff's Rights Under the Fourth Amendment Were Violated.

It is now settled that the Fourth Amendment is applicable to the states through the Fourteenth Amendment (Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L. ed. 1782; Irvine v. California, 347 U.S. 128, 74 S. Ct. 381, 98 L. ed. 561; Frank v. Maryland, 359 U.S. 360, 79 S. Ct. 804, 3 L. ed. 2d 877; Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. ed. 2d 1081).

It is likewise settled that when one's Fourth Amendment rights have been violated, he may recover therefor in a suit under the Civil Rights Act (Cohen v. Cahill, 281 F. 2d 879 [CA 9 1960];

Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. ed. 2d 492.)

And it is also clear that the right to privacy given by the Fourth Amendment protects against more than actual physical seizure (Wong Sun v. United States, 371 U.S. 471, 485-486, 83 S. Ct. 407, 9 L. ed. 2d 441) and against more than surreptitious spying (York v. Story, 324 F. 2d 450 [CA 9, 1963]; pet. for writ of cert. den. 376 U.S. 939, 84 S. Ct. 794, 11 L. ed. 2d 659). Its protection goes, indeed, to "elementary self-respect and personal dignity". (York v. Story, supra, p. 455). The Fourth Amendment, like all the "specific guarantees in the Bill of Rights (has) penumbras, formed by emanations from (that) guarantee ( ) that help give (it) life and substance." (Griswold v. Connecticut, 381 U.S. 479, 484, 85 S. Ct. ___, 14 L. ed. 2d 510 514). These include the rights of "privacy and repose". (ibid, at 484). Here defendants caused plaintiff to be ejected, and the non-state defendants did eject plaintiff, from a place he had a right to be. Only because plaintiff submitted, was actual physical force not used against him. But the threat of force was there. Cf. United States v. Di Re, 332 U.S. 581, 594, 68 S. Ct. 222, 92 L. ed. 210, 220. This is sufficient to invoke Fourth Amendment protection. See, Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. ed. 746, holding that the delivery of a piece of paper, a subpoena duces tecum, was sufficient a seizure, even though the subpoenee himself was to bring the documents, to fall within Fourth Amendment protection. The significance of Boyd in the context here being urged is the better understood from the language of the concurring opinion (29 L. ed. at 755):

"I cannot conceive how a statute aptly framed to require the production of evidence in a suit by mere service of notice on the party, who has that evidence in his possession, can be held to authorize an unreasonable search or seizure, when no seizure is authorized or permitted by the statute."

D. Plaintiff Has Been and Is Being Denied Equal Protection of the Law.

Working in this delicate field of individual human rights, defendants, instead of employing sharp instruments carefully pointed to meet the desired end (Cf. Speiser v. Randall, 357 U.S. 513, 525, 78 S. Ct. 1332, 2 L. ed. 2d 1460, 1472) have painted with too broad a brush and have shown no overriding compelling need therefor. (Bates v. Little Rock, 361 U.S. 516, 524, 80 S. Ct. 412, 4 L. ed. 2d 480; Gibson v. Florida Investigating Committee, 372 U.S. 539, 546, 83 S. Ct. 889, 9 L. ed. 2d 949.)

In a sense, the thought just expressed is a concept of substantive due process. It points up the arbitrary, capricious and unreasonable nature of defendants' "exclusion from the premises" position. However, the idea is urged in this section of our brief for it likewise demonstrates the arbitrariness and unreasonableness of defendants' attempted classification. In addition to the Speiser and other cases cited above, the principle is exemplified by this statement repeated by the Supreme Court in Griswold v.

Connecticut, 381 U.S. 479, 485, 85 S. Ct. ___, 14 L. ed. 2d 510: "a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' "

It is also pointed up in the Supreme Court's decision in Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659, 12 L. ed. 2d 992. In that case, the Court was considering the validity of §6 of the Subversive Activities Control Act (50 U.S.C. 785) which forbade a member of the Communist Party from traveling abroad. This, for the entirely proper purpose of protecting our national security. The Court pointed out that the section applied (378 U.S. at 511) "regardless of the purpose for which an individual wishes to travel" and (at p. 512) "regardless of the security-sensitivity of the areas in which he wishes to travel." Accordingly, the statute is unconstitutional, the Court saying (at page 514):

> " . . . The section, judged by its plain import and by the substantive evil which Congress sought to control, sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. . . . The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in and places for travel. The section therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil.' . . . Yet here,

as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms, . . . "

The case at bar is even stronger from the standpoint of plaintiff. In Aptheker, the evil (prevention of Communists from engaging in subversive activity abroad) is at least clear. The substantive evil against which defendants seek to protect is not here so clear. Presumably, it is the possible bad public image of the gambling industry (RT 33). Yet if protection against a bad public name is the evil, defendants have used anything but precise instruments to effect it. Preventing a man from obtaining hotel or sleeping accommodations is hardly directed to that end.

Defendants make the same constitutional mistake the States of Oregon and California did as exemplified in the cases of De Jonge v. Oregon, 299 U.S. 353, 57 S. Ct. 255, 81 L. ed. 278; Danskin v. San Diego Unified School District, 28 Cal. 2d 536, 171 P. 2d 885 and American Civil Liberties Union v. Board of Education, 55 Cal. 2d 167, 359 P. 2d 45. Namely, attempting to prevent a person from engaging in lawful conduct in one place because he engaged, or it is alleged he engaged, in unlawful conduct elsewhere. In De Jonge, the statute forbade an organization which advocated criminal syndicalism from holding a meeting. Ruling the statute to be unconstitutional as applied, the Court, speaking through Mr. Chief Justice Hughes, said (p. 365):

" . . . If the persons assembling have committed crimes elsewhere, if they have formed or are engaged

in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

"We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that Party. . . . "

In Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 227 P. 2d 449, the rules governing the operation of race tracks required the stewards to exclude, or eject if they succeeded in gaining admission, persons guilty of dishonest or corrupt practices, fraudulent acts or other conduct detrimental to racing, and also, inter alia, "undesirables", 13/ touts and persons of lewd or immoral character. Holding that plaintiff was entitled to an injunction against his being refused admission to the track, the Court held, among other things, that evidence of plaintiff's past conviction of offenses pertaining to gambling and bookmaking

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13/ Cf. RT 459 where the same word is used by defendants.

should have been excluded as irrelevant. Turning next to the heart of the case, the Court said (p. 741):

> "It may be assumed that the plaintiff might be suspected of illegal gambling activities off the race-course. The defendant would be justified in taking reasonable precautions to prevent opportunities for the commission of criminal activities on the course. Here, however, there is no evidence whatsoever, and it is not suggested, that the plaintiff while on the course was or ever had engaged in illegal activities or in an attempt to commit a crime. . . . "

Speaking to the argument that the rules required such persons as plaintiff to be excluded, the Court said (pp. 737 and 740):

> "There is here no quarrel with these rules insofar as they relate to the regulation of the licensee and its employees in the conduct of the races and of wagering on the results thereof. However, insofar as they govern the licensee in exercising the power of exclusion of persons from participation in the public entertainment afforded, they may not be deemed to narrow the established right of participation by all persons on an equal basis. . . .
>
> " . . .
>
> " . . . Cases involving the method of ascertaining the good moral character required of an applicant for a privilege, such as the license to

operate the racecourse, are inapplicable."

In Wakat v. Harlib, 253 F. 2d 59, 65 (CA 7 1958), the Court said:

"... Obviously where there is a record of a man's previous criminal conviction, to the police he is a well-known criminal. ...

"It is clear that the treatment which Harlib and the other defendants gave to plaintiff was different from the treatment which he would have received if he had not had a record of conviction for crime. We are unaware of any recognized distinction between persons having such a record and persons not having such a record, within the orbit of civil rights under § 1985. However, without any authority, plaintiff was so classified by defendants and, in consequence thereof, was deprived of the protection of the federal constitution and laws available to persons in the classification of those not convicted of crime."

In Patterson v. State, 9 Okla. Cr. 564, 569, 132 Pac. 693, 695 (1913), the defendant was charged with keeping a bawdy house. The evidence was that prostitutes had taken a room and slept there on the night in question. Said the Court:

"... Even though the proprietor had knowledge of their reputation and character, however low such

women have fallen, and however great an evil the existence of such a class in the community might be considered, still they are human beings and entitled to shelter, and there is no law which makes it a crime to give them shelter. The law only forbids the giving of shelter or lodging to such persons for immoral purposes. For this reason the facts in our opinion do not warrant a conviction, and as a matter of law the verdict is contrary to the evidence."

In Matter of Farley, 217 N. Y. 105, 111 N. E. 479 the proceeding was to revoke a liquor license on the ground the licensee was operating a disorderly house. In reversing the revocation, then, Judge Cardozo tersely said (217 N. Y. at 110):

"... We have, therefore, looked into the record to discover whether there is such evidence, and we cannot find it. The most that is shown is that some woman of loose character dined or supped in the appellant's restaurant. That is not enough."

In Stoumen v. Reilly, 37 Cal. 2d 713, 234 P. 2d 969, a liquor license was suspended on the ground that homosexuals used the bar as a meeting place. In reversing this holding, the Court said:

P. 716: "... Members of the public of lawful age have the right to patronize a public restaurant and

bar so long as they are acting properly and are not committing illegal or immoral acts; . . . "

P. 715: " . . . There is no evidence of any illegal or immoral conduct on the premises or that the patrons resorted to the restaurant for purposes injurious to public morals."

P. 716: "The fact that the Black Cat was reputed to be a 'hangout' for homosexuals indicates merely that it was a meeting place for such persons. (See Webster's New Internat. Dict.) Unlike evidence that an establishment is reputed to be a house of prostitution, which means a place where prostitution is practiced and thus necessarily implies the doing of illegal or immoral acts on the premises, testimony that a restaurant and bar is reputed to be a meeting place for a certain class of persons contains no such implication. Even habitual or regular meetings may be for purely social and harmless purposes, such as the consumption of food and drink, and it is to be presumed that a person is innocent of crime or wrong and that the law has been obeyed. . . . "

In Vallerga v. Department of Alcoholic Beverage Control, 53 Cal. 2d 313, 347 P. 2d 909, a California statute which authorized the revocation of a license without requiring anything more to be

shown than that the premises are a resort for certain classes of people was held to be unconstitutional.

Accordingly, classification of persons because of reported bad past conduct and not because of any danger of bad conduct on the premises and exclusion and eviction of such person for no other reason, is an invalid classification and must fall. Defendants cannot get around the constitutional prohibition by the argument that plaintiff is being accorded the same treatment as the others in the "class" -- the eleven men listed in the Black Book. This is a beguiling, but fallacious, argument. The classification itself must be valid. (Power Manufacturing Co. v. Saunders, 274 U.S. 490, 493, 47 S.Ct. 678, 71 L.ed. 1165). Here it is not.

The testimony of defendant Hotchkiss (RT 483) that "there is a matter of discretion involved," speaks eloquently of the arbitrariness of defendants' conduct.

III

THE FINDINGS AND CONCLUSIONS ARE NOT SUPPORTED BY THE RECORD IN THIS CASE.

Actually, we believe this point has been covered in the arguments advanced above under Point I. We say a brief word, however.

If appellant is right, as he believes he is, in his contention that he has been denied his constitutional rights by defendants, then the finding of the trial court (CT 187) that plaintiff suffered

no pecuniary damage thereby is unsupportable. The Civil Rights Act itself (42 U.S.C. 1983) provides that damages shall be paid for such deprivation, and damages are traditionally recoverable when one is improperly excluded from a place of public accommodation. Mateer v. Brown, 1 Cal. 221, 230, 52 Am.Dec. 303; Bowlin v. Lyon, 67 Iowa 536, 538-539, 25 N.W. 766; Kisten v. Hildebrand, 48 Ky. (9 B.Mon.) 72, 74, 48 Am.Dec. 416; Atwater v. Sawyer, 76 Me. 539; Markham v. Brown, 8 N.H. 523, 528, 31 Am.Dec. 209; De Wolf v. Ford, 193 N.Y. 397, 401, 86 N.E. 527; Grinnell v. Cook, 3 Hill (N.Y.) 485, 488, 38 Am.Dec. 663; Bennet v. Mellor (1793), 5 T.R. 273, 276, 101 Eng.Rep. 154, 155; Robins & Co. v. Gray (1895), 2 Q.B. 501, 504, 507, 508. Cf. Coger v. North West. Union Packet Co., 37 Iowa 145, discussed in Mr. Justice Goldberg's concurring opinion in Bell v. Maryland, 378 U.S. 226, 295, 84 S.Ct. 1814, 12 L.ed.2d 822, wherein the plaintiff was awarded damages for assault and battery because she, a colored woman, was ordered from the main dining room of a boat.

Moreover, appellant is entitled to injunctive relief under the Civil Rights Act to prevent appellees from continuing in their course of conduct. (Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.ed. 1423).

Similarly, the findings (CT 188) to the effect that the appellees acted reasonably in excluding appellant from the entire premises and that such was necessary in order to achieve effective enforcement of the Nevada Gaming Control Act and the regulations of the appellee Commission and Board, are simply not supported

by the evidence. Appellees have made no showing of what the evil is that has or would result from the law abiding presence of appellant on the non-gaming portion of the premises. It is clear that appellees do not want appellant around, but that is hardly sufficient. If it is injury to the gambling industry that appellees have in mind, they have made no showing of such injury. Moreover, appellees have completely failed to show, as they must when they seek to curtail personal freedom, 14/ that no means, other than the broad and drastic method they have pursued, will combat the evil they allege to exist even had the proof shown, which it does not, that the evil actually exists.

Accordingly, appellees have failed to establish the indispensable base the Constitution requires in order for a citizen to be deprived of his freedom.

14/ " '[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' . . . '[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' " (Aptheker v. Secretary of State, 378 U.S. 500, 508, 84 S. Ct. 1659, 12 L. ed. 2d 992, 999). It is "plainly . . . incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses. . . . " (Sherbert v. Verner, 374 U.S. 398, 407, 83 S. Ct. 1790, 10 L. ed. 2d 965, 972).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing is in full compliance with those rules.

/s/ Fred Okrand

FRED OKRAND

APPENDIX A

TABLE OF EXHIBITS

Plaintiff's Exhibits

Exhibit No.	Identified	Received	Rejected
1	32	34	
2	38, 40	113	
3	42	42	
4	95	95	
5	344	345	
6a	345	345	
6b	346	345	
6c	346	345	
6d	346	345	
6e	346	345	
6f	346	345	
6g	346	345	
6h	346	345	
7a	346	349	
7b	348	349	
7c	348	349	
7d	348	349	
7e	348	349	
7f	349	349	
7g	349	349	

Exhibit No.	Identified	Received	Rejected
7h	349	349	
7i	349	349	
8	349	350	
9	445		446

State Defendants' Exhibits

A1	255	507, 526	
A2	255	260, 503, 526	
A3	255	507, 526	
A4	255	507, 526	
A5	255	261, 503, 526	
A6	255	507, 526	
A7	255	262, 263, 503, 526	
A8	255	263, 503, 526	
A9	255	507, 526	
A10	255	507, 526	
A11	255	264, 503, 526	
A12	255	507, 526	
A13	255	507, 526	
A14	255	507, 526	
A15	255	507, 526	
A16	255	264, 503, 526	
A17	255		505
A18	255		505
A19	255	507, 526	

Exhibit No.	Identified	Received	Rejected
A20	255	507, 526	
A21	255	507, 526	
A22	255	266, 502, 503, 526	
A23	255	507, 526	
A24	255	266, 502, 503, 526	
A25	255	507, 526	
A26	255	507, 526	
A27	255	507, 526	
A28	255	507, 526	
A29	255	507, 526	
A30	255	507, 526	
B	420	420	
C	420	420	
D	425	425	
E	425	425	
F	427	427	
G	487	490	
H	487	490	
I	487	492	
J	493	495	
K	493	497	
L	512	524, 526	
M	529	529	
N	529	529	

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

JOHN MARSHALL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. 360
	)	
GRANT SAWYER, as Governor of the State of Nevada; NEVADA GAMING CONTROL BOARD, RAY J. ABBATICCHIO, JR., as Chairman, GEORGE ULLOM, and NED A. TURNER, as Members, of the NEVADA GAMING CONTROL BOARD, NEVADA GAMING COMMISSION, MILTON W. KEEFER, as Chairman, NORMAN D. BROWN, BERT GOLDWATER, JAMES W. HOTCHKISS and F. E. WALTERS, as Members of the NEVADA GAMING COMMISSION: D. I. OPERATING CO., a Nevada Corporation; ALLEN ROEN, RUBY COLOD, DON BORAX, ARTHUR OSTAP, J. G. MURRAY,	)	
	)	
Defendants.	)	

COMPLAINT FOR INJUNCTION AND DAMAGES

Plaintiff alleges:

I

Plaintiff, John Marshall, is a citizen of the United States and a resident and citizen of the State of Illinois.

Defendant Grant Sawyer, is a citizen and resident of the State of Nevada. He is Governor of the State of Nevada and is charged with the duty of seeing that the laws of that state are

faithfully executed, including the provisions of the Nevada Gaming Control Act (NRS A 1959, 427) and the regulations promulgated pursuant thereto.

Defendants Nevada Gaming Control Board and Nevada Gaming Commission, are the public administrative agencies of the State of Nevada charged with administering the provisions of the said Nevada Gaming Control Act with respect to state gaming licenses.

Defendant Ray J. Abbaticchio, Jr. is the Chairman, and defendants George Ullom and Ned A. Turner are the Members of the Nevada Gaming Control Board. They are citizens and residents of the State of Nevada.

Defendant Milton W. Keefer is the Chairman and defendants Norman D. Brown, Bert Goldwater, James W. Hotchkiss and F. E. Walters are the Members of the Nevada Gaming Commission. They are citizens and residents of the State of Nevada.

Defendant D. I. Operating Co., hereinafter referred to as the Desert Inn or the Desert Inn Hotel is a Nevada corporation, doing business as, and operating, the Desert Inn Hotel in Las Vegas, Nevada and licensed by defendants Board and Commission under the said Nevada Gaming Control Act.

Defendants Allen Roen, Ruby Colod, Don Borax, Arthur Ostap and J. G. Murray are citizens and residents of the State of Nevada. They are employees and agents of defendant Desert Inn and at all times herein mentioned acted as, and within the scope of their employment as such.

III

This Court has jurisdiction under 28 USC 1343(1), (3) and (4) and under 42 USC 1983 and 1985 (3).

This is a civil action arising under the Federal Civil Rights Act, 28 USC 1343 of which, provides in part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

". . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, . . ."

IV

At a time and place unknown to plaintiff, but well known to defendants Sawyer, Board and the members thereof

and Commission and the members thereof, said defendants entered into an agreement and adopted a policy to discriminate against and to bar plaintiff from the State of Nevada as a person designated by them as "undesirable".

In entering into said agreement and adopting said policy, the defendants Sawyer, Board and Commission and the members thereof intended that plaintiff be barred from registering at a hotel, from obtaining service in the dining room or coffee shop of a hotel, from sitting in the lounge or foyer of a hotel, from being in the casino or on the premises of a hotel at any time, for any occasion and under any circumstances.

Said agreement and policy included the compilation, publication and distribution by defendants Board and Commission and the members thereof, of an 8" x 10" booklet bound in black, commonly designated as the "Black Book", containing the names and pictures, including among them, plaintiffs, of persons designated as, and deemed "undesirable" by said defendants. All of this was done without notice or hearing to the persons so designated, including plaintiff.

To enforce said agreement and policy, the agreement and policy also included coercion, intimidation and inducement by said defendants, by threat of loss of license, upon the hotels of the State of Nevada to prevent the presence of plaintiff in the hotels.

V

Pursuant to said agreement and policy, and to effectuate the same:

1. Defendant Swayer, on or about November 2, 1960, publicly states:

"I agree with any measures necessary to keep the hoodlums out of Nevada. The operators have a great responsibility to cooperate.

"We might as well serve notice on underworld characters right now they are not welcome in Nevada and we aren't going to have them here."

In making said statement, defendant Sawyer knew what had happened to plaintiff, as described below in subparagraph 5 hereof, and it was in connection therewith and in the context thereof that said defendant was speaking.

2. The defendants Board and Commission and the members thereof, at a time unknown to plaintiff but well known to said defendants, promulgated and issued, without notice or hearing to the persons designated therein, including plaintiff, the "Black Book" referred to in Paragraph IV above;

3. On or about March 29, 1960 said defendants Board and Commission and the members thereof, distributed said Black Book to hotel operators in the State of Nevada accompanied by a letter, over the signature of defendant Abbaticchio, which reads in whole or in part, so plaintiff is informed and believes, and therefore alleges;

"The attached booklet which will be revised and expanded periodically, contains descriptive data with photographs concerning 11 persons (here

they are listed, including plaintiff).

"In order to avoid the possibility of license revocation for 'unsuitable manner of operation' your immediate cooperation is requested in preventing the presence in any licensed establishment of all 'persons of notorious or unsavory reputation' including the above individuals as well as those who subsequently may be added to this list."

4. Defendants Board and Commission and the members thereof, personally or through their representatives, so plaintiff is informed and believes and therefore alleges, orally informed the recipients of said booklet and letter that unless said recipients acceded to the "request" of said defendants as contained in said letter they, the recipients, would lose their licenses.

5. Defendants took the following action against plaintiff:

On the evening of Friday, October 28, 1960, plaintiff was sitting in the lounge of the defendant, Desert Inn Hotel. He was not committing and had not committed any public offense. Solely because of inducement and/or "request" by representatives of the Defendant Board and Commission and the members thereof, led personally by defendant Abbaticchio who was present with the other representatives and to effectuate the aforementioned agreement and policy, defendants Roen, Colod, Borax, Ostap and Murray ousted plaintiff, under threat of physical force, from the hotel premises. A large number of persons was in the hotel and observed the ousting.

6. In order to harass and intimidate the hotel operators into ousting plaintiff from the hotels, representatives of the defendant Board and Commission and the members thereof, led personally by defendant Abbaticchio, on said evening of October 28, 1960 and others, confiscated cards and dice in the casinos of various hotels in Las Vegas, including those of the defendant Desert Inn, while games were in progress and in full view of public patrons. Such conduct is extremely detrimental to the gambling business of said hotels because, in the eyes of the public, such confiscation of dice and cards while games are in progress implies dishonesty on the part of the hotel operators; said defendants knew that such an impression would be, and they intended that it be given.

7. Defendant Abbaticchio, on or about October 29, 1960, publicly states:

> "There has been some failure of certain Strip operators to abide by an agreement with the control board not to entertain or provide or furnish facilities or cater to those people we consider undesirable and detrimental to the gaming industry because of their association with the underworld.
>
> ". . .
>
> ". . . We are attempting to get them (the reneging Strip operators) to cooperate with the control board."

In making said statement, defendant Abbaticchio knew what had happened to plaintiff, as described above in subparagraph 5

hereof, and it was in connection therewith and in the context thereof that said defendant was speaking.

VI

Plaintiff is informed and believes and therefore alleges that the basis for the designation of plaintiff as an "undesirable" by defendants Sawyer, Board and Commission and the members thereof is the claimed "criminal record" of plaintiff, In point of fact the record of convictions of the plaintiff, aside from traffic tickets, is as follows:

1. In 1929, in Chicago, Illinois, at the age of 18 years, plaintiff was placed on probation for one years for larceny of an automobile;

2. In 1931, in Chicago, Illinois, at the age of 20 years, plaintiff was convicted of petty larceny. His sentence was six months in the House of Correction and $1.00, which sentence plaintiff served and paid;

3. In 1932, in Milwaukee, Wisconsin, at the age of 21, plaintiff was convicted of advising the commission of a felony. He was sentenced to one to three years in the House of Correction. Plaintiff served 19 months of this sentence and was then paroled for the balance thereof; he fulfilled all the terms of his parole.

4. In 1933, in Berwyn, Illinois, at the age of 22, plaintiff was fined $1.00 for disorderly conduct.

5. In 1939, plaintiff was fined $50.00, $100.00 and $15.00 respectively, in one proceeding, for misdemeanors, the exact nature of which plaintiff does not now remember.

6. In 1955, in Beverly Hills, California, plaintiff was arrested on a week-end and charged with failing to register as an exconvict under the Beverly Hills ex-convict registration ordinance. Plaintiff did not know that there was such an ordinance in Beverly Hills nor that he was required to register under it. On being told by the Chief of Police of Beverly Hills that the fine would undoubtedly be $50.00 if plaintiff appeared in court and that he could forfeit the bail, which had also been set at $50.00, and be free, plaintiff posted the $50.00 bail and forfeited it.

In 1960, the Supreme Court of the State of California, in the cases of Abbott v. City of Los Angeles, 53 Cal. 2d 674, and Lambert v. Municipal Court of Los Angeles County, 53 Cal. 2d 690 declared such an ordinance, as the Beverly Hills ordinance above referred to, to be unconstitutional.

VII

Plaintiff's name at birth was Marshal Caifano. In 1955, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, in proceeding number 70653, plaintiff's name was legally changed to John Michael Marshall, which has been his name ever since.

VIII

During the years 1953-1956, plaintiff was a citizen of the State of Nevada and a resident of Las Vegas.

Plaintiff owned some real property in Las Vegas which he sold in 1954. The payments on the note, which was given for payment and which is secured by a mortgage, have not been met and

the matter is now in litigation in the Eighth Judicial District in Las Vegas, Nevada. It is necessary for plaintiff to come to the State of Nevada and to Las Vegas in connection with this litigation, including consultation with counsel; and in order to negotiate for the sale of his interest in the property or to develop it.

Plaintiff cannot stay at a hotel in the State of Nevada for the reason that if he does, defendants Sawyer, Board and Commission and the members thereof, pursuant to the agreement and policy above set forth will induce the operators of the hotel to oust plaintiff from the premises in the same manner as described above in Paragraph v, 5.

IX

By reason of the public ousting of the plaintiff by defendants as above set forth, plaintiff was damaged, suffered humiliation, embarrassment, loss of the right to public accomodation and to freedom of movement. In addition to which, the incident was widely publicized in the public press in Las Vegas causing him further damage, humiliation, embarrassment and loss of said rights. Said publications are referred to herewith, incorporated herein as though fully set forth, and a copy of one thereof attached hereto as Exhibit "A".

WHEREFORE, plaintiff prays:

1. As to the defendant officials of the State of Nevada:

(a) For damages in the amount of $100.00 against each of the defendants Sawyer, Board, Commission, Abbaticchio, Ullom,

Turner, Keefer, Brown, Goldwater, Hotchkiss and Walters;

(b) For an injunction restraining and enjoining defendants Sawyer, Board and Commission and the members thereof, their agents, employees or any one acting in concert with them or on their behalf, from giving effect to said policy and action of keeping plaintiff out of the State of, and hotels in, Nevada through said Black Book or said letter of March 29, 1960, and from causing, coercing or inducing the operators or employees of hotels in Nevada, by threat of cancellation of license or otherwise, to bar or eject plaintiff from their premises, or to refuse to give service or afford accomodations to plaintiff on the same basis as any other citizen;

2. For damages against the defendants Desert Inn, Allen Roen, Ruby Colod, Don Borax, Arthur Ostap and J. D. Murray in the sum of $150,000.00;

3. For costs of suit incurred herein;

4. For such other and further relief as to the Court shall seem just and proper.

W. ALBERT STEWART, JR.

W. B. BEIRNE

A. L. WIRIN

FRED OKRAND

of counsel Attorneys for Plaintiff

FILED

DEC 22 1960

OLIVER F. PRATT, Clerk

By Ray Mana Smith, Deputy

APPENDIX C

TITLE OF COURT AND CAUSE

ANSWER

The Defendants D. I. OPERATING CO., a Nevada Corporation ALLARD ROEN, named in Plaintiff's Complaint as "ALLEN ROEN", RUBY KOLOD, named in Plaintiff's Complaint as "Ruby Colod", DON BORAX, ARTHUR OSTAP and J. G. MURRAY, answering the Complaint allege:

I.

Allege that they have no knowledge or information sufficient to form a belief as to the truth of Paragraphs l, lll, iv and subparagraphs 1, 2, 4 and 7 of Paragraph V, VI, VII, VIII and IX, except the Defendant D. I. OPERATING CO. admits that it received the so-called "Black Book" described in said paragraph IV; further with reference to subparagraph 2 of said Paragraph V, the defendant D. I. OPERATING CO. admits that it received a copy of the so-called "Black Book".

II.

Admit the allegations of Paragraph II thereof; however, said Defendants allege that the true name of "Allen Roen" is ALLARD ROEN and the true name of "Ruby Colod" is RUBY KOLOD.

III.

Answering subparagraph 5 of Paragraph V, defendants

admit the allegations thereof, save and except they deny that Plaintiff was ousted from the hotel premises under threat of physical force or by means of physical force.

IV.

Answering subparagraph 6 of paragraph V, defendants admit that on or about October 28, 1960, the defendant Ray J. Abbaticchio and others confiscated cards and dice in the casino of Wilbur Clark's Desert Inn while games were in progress and in full view of public patrons; Defendants also admit that this action is extremely detrimental to the gambling business of hotels. Other than that which is herein admitted, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations of said subparagraph.

WHEREFORE, defendants pray that plaintiff's Complaint be dismissed as against these defendants, for their costs of suit, and for such other and further relief as the Court shall deem just and proper.

Dated this 30th day of January, 1961.

Affidavit of service

FILED

JAN 30 1961

OLIVER F. PRATT, Clerk

by ROSE KIZER, Deputy

MORSE AND GRAVES and

J. A. DONNELLEY

By MADISON B. GRAVES

affidavit

NO. 20145

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN MARSHALL,

Appellant,

vs.

GRANT SAWYER, et al.,

Appellees.

APPELLANT'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

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Los Angeles, California 90014

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Attorneys for Appellant

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APPELLANT'S REPLY BRIEF

Appellant, in this one brief, will reply first to the Reply Brief of the State appellees and, in the second part, to the Brief of the non-State appellees.

I

RESPONSE TO REPLY BRIEF OF THE STATE DEFENDANTS

A.

Preliminary Statement

Although appellees suggest (Br. 38) that "Plaintiff is guilty of a serious misstatement in stating to this Court that this is not a gambling case," the fact is precisely that: This is not a gambling case. It will be time enough, if ever the occasion should arise,

to test the validity of appellees' conduct or appellant's rights, if appellant should ever seek a gambling license, or seek to invest in a gaming casino, or buy a slot machine or try to place a bet at a dice table or even put a nickel in a slot machine. But that time is not now. This case is concerned with the validity of appellees' claim by use of the Black Book (Exh. 1), the accompanying letter (Exh. 3) and their conduct as shown by the evidence in this case to, in appellees' words (Br. 14), exclude appellant not only from gaming premises but also from "the hotel, golf courses, swimming pool, etc." 1/ The case has nothing to do with gambling; it has to do with the right of appellees to, for example, require the ousting of appellant from his room when he has retired for the night to sleep after having come to Las Vegas to give his deposition in a court case (RT 213-214). It is this kind of a right which is involved in this case and the case is not concerned, as appellees would have it (Br. 40, 25) with "our" "fragile" "gambling industry" (position of quoted words interchanged).

Accordingly, appellees' resume of the history (Br. 2-7) of gambling in Nevada, and the attention given to "gambling and closer supervision of licensees and investigation of applicants for licenses" (Br. 7), and their statements (Br. 8, 11) that the

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1/ A far wider exclusion is contemplated by appellees' action. There are 900 licensed establishments in Nevada with gambling devices (RT 433). Only 120 of these are resort hotels or large casinos without other facilities (ibid). This means that 780 are the drug stores, the service stations, etc., which have even a single slot machine (RT 428). These, too, in the language of appellees are known as gambling casinos (RT 428-429).

gaming industry is important to the economy of Nevada and requires strict supervision, present no facts nor offer any reason why the broadside tactic employed by appellees may stand.

Indeed, even if this be a "gambling industry" case, appellees have presented no facts -- but none -- justifying their infringement of personal rights.

B.

The Facts

Nowhere in its Statement of Facts (Br. 8-15) have appellees been able to point to any facts -- any overriding necessity -- for their startling broadside approach. This is so, of course, because there are no facts in the record which justify it. That gaming is an important industry to the economy of the State (Br. 8) and requires supervision (Br. 11), which apparently is the sum total of all the facts appellees can muster to justify their conduct, are simply not the kind of facts or showing needed to override personal constitutional right. If the kind of argument advanced by appellees -- that because an industry or activity is important to a State and requires supervision, this is sufficient factual showing to justify infringement -- were to prevail, this would virtually mean the end to personal constitutional rights. In California, for example, it would mean that the Department of Alcoholic Beverage Control could prevent homosexuals from being or congregating at a place where liquor is sold. But the law does not permit such reasoning. (Vallerga v. Department of Alcoholic Beverage Control, 53 Cal. 2d

313, 347 P. 2d 909; cf. United States v. Romano, ___ U. S. ___, 15 L. ed. 2d 210, 86 S. Ct. ___).

Appellees have referred to no facts in the record -- nor were there any adduced at trial -- showing any harm to the gambling industry from the presence of appellant or of other persons in the Black Book (or of similar persons, if one is to be permitted to use vague language) as paying customers for the accommodations which the hotels offer. And they certainly have not shown that whatever, even speculatively, harm may be said to result from appellant being permitted to gamble or be in the gaming area, cannot be accomplished by less drastic means than banishment from the entire premises.

Appellees take issue (Br. 8) with appellant's Statement of Facts (Op. Br. 2-11), but they do not point out how, in any way, it is inaccurate nor not supported by the evidence. Instead, appellees content themselves (Br. 8) with relying on the Findings of Fact made by the trial judge. Presumably, although they do not say so, appellees are relying upon Findings LIV and LV (CT 188), to the effect that appellees acted reasonably in classifying appellant as an undesirable person who should be excluded from gaming establishments in Nevada and that the exclusion from the entire premises was necessary to achieve effective enforcement of the gaming law and regulations. But appellees' reliance on these findings aid them not; reliance thereon begs the question. The Court made no findings nor any reference to facts which support them nor do appellees;

nor does the record. 2/

What appellees refuse to recognize is that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly, and thereby invade the area of protected freedoms." (NAACP v. Alabama, 377 U.S. 288, 307, 12 L.ed.2d 325, 84 S.Ct. 1302). See also, Schware v. Board of Bar Examiners, 353 U.S. 232, 239, 1 L.ed.2d 796, 77 S.Ct. 752; Martin v. Struthers, 319 U.S. 141, 146-149, 87 L.ed. 1313, 63 S.Ct. 862; Cantwell v. Connecticut, 310 U.S. 296, 304-307, 84 L.ed. 1213, 60 S.Ct. 900; Schneider v. State, 308 U.S. 147, 161, 165, 84 L.ed. 155, 60 S.Ct. 146. The same principle was put this way by the Court in Shelton v. Tucker, 364 U.S. 478, 488, 5 L.ed.2d 231, 81 S.Ct. 247:

> ". . . [E]ven though the governmental purposes be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose."

Viewed in the light of this constitutional principle, it is

2/ The trial court's findings (CT 182-184) as to appellant's criminal record and reputation are not facts which show harm to the gambling industry from appellant's watching a golf tournament or eating lunch, nor do they furnish justification for attempting to prevent him from so doing. See e.g. Appellant's Op. Br. 45. It is interesting to compare appellees' statement (Br. 14) that appellant was "suspected of being with an organization that used 'muscle' tactics" with the same characterization of appellees' conduct here by the Nevada Attorney General (RT 445).

manifest that appellees did not even make the effort to meet it. As stated by appellees in their brief (p. 11), they hit upon the Black Book idea "from the sense of the public image of the State of Nevada and of its citizens; and also from the standpoint of the reaction that might (emphasis added) be expected from good customers in the gaming establishments." None of the record references gives any facts to support these fears and there is no evidence to show any deleterious effects which caused appellees to embark upon the program. Indeed, a reference to appellees' Exhibits B, C, and F would indicate that Nevada has grown apace with the rest of the country. 3/

Thus, when the whole matter is dissected and examined, it becomes clear that appellees' action was not based upon any improper operation of gambling establishments, or any reasonable fear that its licensing of gambling establishments or of licensees was not efficient enough to protect the public. No, it was a "matter of publicity" (RT 36). "The problem was to protect the good name of the legal gambling industry in the State of Nevada and, of course, the State of Nevada itself." (RT 33). For this, then, appellant became the scapegoat and appellees' broadside method ordained.

3/ Appellees' brief asserts (p. 11) that concern about the United States Attorney General having an interest in Nevada and particularly Las Vegas was also a factor contributing to appellees' program. This is an inadvertence on appellees' part. The evidence is that the interest, whatever that may mean or be, of the Attorney General, was not exhibited until after the Black Book and letter had been promulgated and distributed (RT 474).

C.

The Law

Perhaps the gist of the case is capsuled in appellees' statement (Br. 17) that they "assert a right to determine who may go on the premises of a licensed gaming house, whether it be on the golf course, the swimming pool, the hotel, restaurants, bars or gambling casino. In enforcement of this right they assert the collateral right to exclude from such premises all people who, in the judgment of the Nevada Gaming Control Board, can be classified as notorious or unsavory people and to advise the licensed gaming casinos of this classification and request them not to cater to these people." Assuming that appellees' asserted right just quoted, is to protect the good name of the gambling industry, as they claim, appellees have simply shot too wide. They have failed to fashion their remedy to meet their objective. See appellant's opening brief, pp. 40-42.

Appellees assert, without any evidence nor facts to back them up, that (Br. 19) "it is believed (emphasis added) that if Nevada does not find a suitable way to keep the hoodlum element away from the gaming industry that the entire industry is in serious jeopardy." This may or may not be the case. But in any event, more than belief is necessary before the State can interfere with an individual's right. And, as we have shown, more precise methods are required.

(1)

Appellant Was and Is By the Black Book and Appellees' Conduct Pursuant Thereto Denied a Federally Protected Right (Reply to Appellees' Point I, pp. 19-23)

We do not understand appellees' statement (Br. 19-20) that merely because the State need not permit gambling, its denial to some and permission to others cannot violate a federally protected right. In the first place, it again pre-supposes, incorrectly, as we have tried so hard to point out, that appellant is seeking the right to gamble. Again: that is not this case. But even if it were, the time is long since past where the State, under the guise of some concept of privilege, can avoid constitutional proscription. In Wieman v. Updegraff, 344 U.S. 183, 192, 97 L.ed. 216, 73 S.Ct. 215, a State case involving the question as to whether a University professor could be required to take a loyalty oath and who was discharged when he refused, the Court said:

> " . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to statute is patently arbitrary or discriminatory. . . . "

Accord: Slochower v. Board of Higher Education of the City of New York, 350 U.S. 551, 100 L.ed. 692, 76 S.Ct. 637.

In Homer v. Richmond, 292 F.2d 719, 722 (CA DC 1961), the Court put it this way:

> " . . . One may not have a constitutional right to go

to Baghdad but the Government may not prohibit one from going there unless by means consonant with due process of law."

Cf. Gomillion v. Lightfoot, 364 U.S. 339, 347-348, 5 L. ed. 2d 110, 117, 81 S. Ct. 125: " '(A) constitutional power cannot be used by way of condition to attain an unconstitutional result.' "

Accordingly whether the State may prohibit gambling altogether is quite beside the point.

Moreover, we believe it perfectly clear that irrespective of what the Supreme Court may ultimately say is the right or lack thereof of an individual business man who is licensed by the State to do business with the public, to refuse to do business with some, there can be no doubt that the State has no right to so exclude. We suggest that with Aptheker v. Secretary of State, 378 U.S. 500, 12 L. ed. 2d 992, 84 S. Ct. 1659, making so clear what the Court had indicated to be the case in Kent v. Dulles, 357 U.S. 116, 127, 2 L. ed. 2d 1204, 78 S. Ct. 1113, namely that the right to travel is a constitutionally protected right, it can hardly be doubted that the right of the traveler to partake of public accommodations is likewise a federally protected right -- at least where the State seeks to take it away from one and not from all.

Appellees' reliance (Br. 20) upon Ah Sin v. Wittman, 198 U.S. 500, 49 L. ed. 1142 is misplaced. In the first place, in the light of recent Supreme Court decisions such as Lambert v. California, 355 U.S. 225, 2 L. ed. 2d 228, 78 S. Ct. 240, Smith v. California, 361 U.S. 147, 4 L. ed. 2d 205, 80 S. Ct. 215, Robinson v.

California, 370 U.S. 660, 8 L. ed. 2d 758, 82 S. Ct. 1417, the validity of Ah Sin, in so far as it holds that it is not a violation of due process to punish innocent conduct, is seriously open to question. See, also, United States v. Moreno, ___ U.S. ___, 15 L. ed. 2d 210, 86 S. Ct. ___. Moreover, the facts in Ah Sin were quite different from those here. Not only is this not a gambling case, and not only was gambling in Ah Sin itself illegal, but also "illegal" were the very "premises" where the gambling took place. Here, appellees assert the right to exclude not only from where the gambling takes place but from all the premises -- the dining room, lavatories, shops, etc. At least in Ah Sin, judicial proceedings had to be filed. Here appellees claim the right by ipse dixit.

Furthermore, in addition to the over-broadness concept of Aptheker, NAACP v. Alabama, and the other cases cited, supra, decisions like Thompson v. City of Louisville, 362 U.S. 199, 4 L. ed. 2d 654, 80 S. Ct. 624, and Garner v. Louisiana, 368 U.S. 157, 7 L. ed. 2d 207, 82 S. Ct. 248, make clear that the State has no right to seek to prevent an individual from just being in a public place of business, absent his making a disturbance, at least when he is there for the purpose for which the business is open. Cf. Shuttlesworth v. City of Birmingham, ___ U.S. ___, 15 L. ed. 2d 176, ___ S. Ct. ___.

Nor does Wall v. King. 206 F. 2d 878 (CA 1 1953) or Lewis v. United States, 348 U.S. 419, 99 L. ed. 475, 75 S. Ct. 415, aid appellees. This is not a licensing case; appellant seeks no license. With due respect to Judge Pope, concurring when this case was

previously before this Court, and relied upon by appellees (Br. 21), we respectfully point out that his views were not those of the Court and again, appellant's assertion is not (ibid) "that he cannot be excluded from a gambling establishment". Appellant's assertion is, similar to that in the sit-in cases, that he cannot be denied the right to get a cup of coffee at the restaurant or to buy a newspaper at the cigarette counter. Accordingly, appellees' reiteration (Br. 21) that "the privilege of going upon the premises of a licensed gaming establishment is a local privilege and . . . therefore" not Federally protected, disregards all the law made by those cases.

Neither Webb v. State University of New York, 125 F. Supp. 910 (ND NY 1954), app. dism. 348 U.S. 867, 99 L.ed. 683, 75 S. Ct. 113, nor Hamilton v. Regents of the University of California, 293 U.S. 245, 79 L.ed. 343, 55 S. Ct. 197, relied upon by appellees (Br. 22) is apposite. Both have to do with the operation of a state university, with the petitioners seeking to participate or have some part therein. Here involved, is freedom of movement, with appellant seeking to have no part of that which appellees are empowered to license.

The decision by this Court when the instant case was previously before it makes clear that this right of freedom of movemant will be and is protected under the Federal Constitution.

The Police Power Affords Appellees No Refuge From Their Conduct In Excluding Appellant From Non-Gambling Premises (Reply to Appellees' Point II, pp. 23-25)

The very citation, and reliance upon by appellees (Br. 23), of Flores v. Los Angeles Turf Club, 55 Cal. 2d 736, 361 P. 2d 921, demonstrates its lack of applicability here and the correctness of appellant's position.

Flores is not the case at bar. It is quite a different thing and the difference is demonstrated from the case itself. Appellees have failed to make the analysis required.

In the first place, in Flores, no one, and certainly not any state officials, had drawn up a list of named individuals. Moreover, the statute which authorized the California Horse Racing Board was very narrow and authorized exclusion only "from the enclosure where horse races are licensed by the board, or from specified portions of such enclosure." (emphasis added). This is a far cry from authorizing total exclusion from all the area on which a race track happens to be. Thus, for example, the statute did not purport to, and did not permit the exclusion of a person from the Los Angeles County Fair Grounds at Pomona or the State Fair at Sacramento, where all kinds of other attractions are offered -- live stock shows, agricultural exhibits, the mid-way, scientific displays, etc. -- in addition to horse racing. (See California Business & Professions Code §19561). Had the statute authorized, or the facts indicated, total exclusion from such a

place, the case would approach more closely that at bar.

Furthermore, the exclusion was not of so nebulous a class as "persons of notorious or unsavory reputation" (Exh. 3), but of persons who had been engaged in illegal activity concerning horse racing (bookmakers, touts and "persons who have been convicted of violation of [the California Horse racing laws] or of the laws prohibiting bookmaking or other illegal forms of wagering on horse races") -- in other words, illegal activity, closely -- no, intimately -- connected with the very industry being regulated. Appellees can make no such claim here. Indeed, through their counsel, they conceded to the trial court (RT 357): "I don't think Mr. Marshall's gaming activities would be the reason we would want to exclude him."

In addition, the regulations were specific and dealt with the business at hand, prohibiting persons to whom the regulation applied from participating in pari-mutuel wagering conducted under the jurisdiction of the Horse Racing Board 4/ and, as applied to the Flores case (55 Cal. 2d at 739, f. n. 2) meant persons convicted of violating a specific bookmaking law.

Additional difference between this case and Flores is the fact that the statute provided (ibid) for a hearing before the Horse Racing Board with court review. This is far different from the instant case where the appellees sat down and drew up a list of

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4/ This feature of the Flores situation points up the difference between this case and that, and emphasizes the correctness of appellant's contention that "this is not a gambling case".

named individuals without provision for even after-the-fact hearing, nor for court review. It is because of Flores' failure to exhaust his administrative remedies that the court said the trial court had properly dismissed plaintiff's injunction cause of action. Said the court (pp. 746-747): "In the face of so pervasive a system of administrative procedure, it would appear difficult to maintain that the Legislature did not intend that this system provide the exclusive initial recourse for persons aggrieved by the operation of its regulatory legislation. And, in similar instances, the courts have withheld judicial relief from those who have not first availed themselves of the administrative remedies provided."

Additionally pointing up the difference between Flores and the instant case is the California Court's recognition (p. 742) that "there exists no constitutional or common-law right of access to race tracks or other places of public amusement comparable to the right to accommodation at inns." And distinguishing previous California cases which had refused to approve license loss in the absence of improper conduct by persons on the premises themselves because (55 Cal. 2d at 743) "the state may not ... by the application of general statutory standards, require (licensees) to undertake actions not specifically related to the objective which the state desires to accomplish," (emphasis added), the Court pointed out (p. 744) that "the restriction imposed by the instant statute is not apparently unrelated past conduct of others, but a past conviction for closely related conduct of the regulated party himself." (emphasis added).

And the Court recognized (what is missing in the present case) that there were facts which justified even the specific classification there. Thus there were figures showing the loss of tax revenue to the State through illegal wagering activity. No such figures were presented at bar. Next, there were facts showing the recidivist records of convicted bookmakers. No such evidence was sought to be presented showing the recidivism, even if there could be such a thing, of "persons of notorious or unsavory reputation" (Exh. 3). Perhaps more importantly, the Court had before it facts showing conduct at the track itself, namely (55 Cal. 2d at 744) "the frequent use of the pari-mutuel windows by bookmakers to 'lay-off' portions of their bets in order to hedge themselves against the financial disaster of losing on a horse on which they have accepted a large amount in bets and in order to lower the odds on such a horse." No such on-the-spot deleterious conduct by appellant here nor any one else was ever intimated by appellees. Indeed, appellees themselves concede that appellant conducted himself properly (Br. 36) and the record is clear that this is so at all times throughout many years that appellant had been on the premises (e.g. RT 166, 173, 185, 191-192). And finally, the California Court had before it material showing "the difficulty of detecting among the large crowds ... those who are using (the betting windows) illegally, or who are improperly soliciting customers for illegal side bets." No such effort was made by appellees here. Indeed their very point is not the difficulty of detection, but the ease of detection and the bad image the state will get if appellant is known to be anywhere

on the premises (RT 33).

Accordingly, the Flores case does not argue for the validity of appellees' conduct here, but, on the contrary, demonstrates the invalidity thereof. Should appellees attempt a narrow procedure directly related to gambling, it will be time enough to consider whether they will have met the Flores standards. The instant case is not such.

Finnessey v. Seattle Baseball Club, 122 Wash. 276, 210 Pac. 679, cited by appellees (Br. 24) is inapposite. That case relates to illegal conduct in the ball park itself. Nor does State v. Baker, 50 Ore. 381, 92 Pac. 1076, apply. Age and sex classifications are in an entirely different category from the case at bar.

Appellees cannot prevail in this case by the boot strap argument (Br. 25) that because they have determined to embark upon the Black Book course, that settles the matter. As we have previously pointed out, appellees' conduct sweeps too broadly (see quotation under discussion of Facts, supra). Moreover, it is the law that when a State seeks to curtail individual liberty, it must make a showing and demonstration of a "subordinating interest" which is "compelling" (Schneider v. Irvington, 308 U.S. 147, 84 L.ed. 155, 60 S. Ct. 146; Sweezy v. New Hampshire, 354 U.S. 234, 265 [conc. op.], 1 L. ed. 2d 1311, 1331, 77 S. Ct. 1203; NAACP v. Alabama, 357 U.S. 449, 463, 2 L. ed. 2d 1488, 1500, 78 S. Ct. 1163). No such showing nor demonstration has been made here. Further, it is "incumbent upon (the state) to demonstrate that no alternative forms of regulation would combat" the evil.

(Sherbert v. Verner, 374 U.S. 398, 407, 10 L.ed.2d 965, 972, 83 S. Ct. 1790). This, appellees have failed to do.

(3)

The Failure To Provide For a Hearing Denies Due Process (Reply to Appellees' Point III, pp. 26-31).

Appellees can surely not justify their arbitrary unilateral conduct by urging failure to exhaust administrative remedies which did not and do not exist. And while the fact as to whether appellant knew he was in the Black Book prior to the week ending October 29, 1960 (Br. 26) is irrelevant, appellees must certainly know that they cannot argue, as they do (ibid), the facts to be just the opposite to what the uncontradicted evidence is (RT 223-225).

Appellees' reference (Br. 26-27) to "regulations" having to do with food handling, driving tractors on a highway, leash laws, driving while intoxicated is a non-sequitur. No citations to those regulations or statutes are given, but we know of no laws or regulations, and we doubt they exist, which say, for example, that John Doe may not walk his dog without a leash, or that Richard Roe may not drive a car while intoxicated. Fortunately that is not yet the permissible state of the law in this country and, so long as the Bill of Attainder provision is in the Constitution (Art. I, §10, Cl. 1), it will never be. 5/

5/ In this connection, it is significant that California in its statutory scheme which led to the Flores case, supra, provides that it is a misdemeanor for one to enter a horse racing enclosure after the administrative and court proceedings have been (Continued)

The importance of a hearing is demonstrated by appellees' bland use (Br. 27) of the term "police record". We suggest that such is simply not sufficient. Ghandi, too, had a "police record" and so does Martin Luther King, Jr. Nor, in appellant's case, does a single felony conviction almost 30 years before the Black Book, a misdemeanor conviction under an unconstitutional statute, and long past misdemeanor convictions (see Complaint, p. 7; RT 14) have persuasive bearing on appellees' asserted interest in protecting the good name of the gambling industry. We repeat, this is not a gambling case and appellant seeks no license from appellees. Suggestions that arrests on "suspicion" or for "investigation" or on "GP" (general principles; e. g. Exh. L) are probative, need not be dignified by comment. (Cf. Douglas, "Vagrancy and Arrest on Suspicion", 70 Yale L. J. 1; Staples v. United States, 320 F. 2d 817 [CA 5 1953]; see, also Flores v. Los Angeles Turf Club, 55 Cal. 2d 763, 748, 361 P. 2d 921).

Appellees' reference (Br. 27) to a supposed remedy in the Nevada state courts is made, of course, in disregard of the decision by this Court previously in this case (301 F. 2d 639) and also in disregard of Monroe v. Pape, 365 U. S. 167, 5 L. ed. 2d 492, 81 S. Ct. 473.

Similarly in disregard of our basic precepts, is appellees' attempted justification (Br. 27-28) based on the "'good guys'" versus "bad guys" concept. Appellees, lamentably, forget that "the rights

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5/ (Continued): exhausted and held against him (Calif. Bus. & Prof. Code §19574). And so, even with all its administrative procedures, California relies for enforcement on the due process method of the criminal court.

of good men are secure only so long as the rights of bad men are also protected." (Mathes, "A New Order of the Ages: Free Speech and Internal Security", Oct. 1959, ABA Jl. 929).

Nor does appellees' reliance (Br. 28-29) on Judge Pope's concurring opinion aid them. While laws may, indeed, be passed without hearing, the imposition of penalties may not be. Nor is the tractor analogy apt. That has to do with present illegal conduct. When one violates a valid general law, the state may provide that he -- not by name, but because he violated the law -- may be arrested and prosecuted therefor. But there is no authority, certainly without a hearing, to administratively decree that John Doe is engaged in illegal conduct. Indeed, with due respect, the misapprehension under which the concurring Judge was laboring is demonstrated by his caveat (Br. 29) that the trial Court "may well find that plaintiff's entry upon the gambling premises (a place not involved in this case) would present an emergency comparable to that presented by an animal running at large while suspected of being afflicted with the hoof and mouth disease." 6/ There is no

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6/ If this analogy to an animal afflicted with the hoof and mouth disease be correct, it would of necessity have to apply to the current licensees who had been "grandfathered" in by appellees, and who "formerly had unsavory reputations" (RT 67) and have "extensive police records" (RT 59). Indeed, they would present a greater "emergency" since they were already in the "pasture" so to speak, mixing with others and in a position to deleteriously affect the public image of the gambling industry by the ailments with which they were afflicted. With due respect, Judge Pope's misunderstanding of what appellees were seeking to do and the reason for their conduct is seen from his comment (301 F. 2d at 653), after pointing out that appellant had been convicted of a felony, "that a state may validly refuse the privilege of gambling to such a person." But plaintiff is not seeking here to establish his right to gamble! Again,

(Continued)

evidence to support any finding even remotely approaching such a conclusion, nor even one couched in milder terms. The evidence is clear -- appellees themselves conceding it (Br. 36, 38) and if they did not, they would be flying in the teeth of the record (RT 166, 173, 185, 191-192) -- that not once has appellant's presence ever created an untoward situation, save, of course, that engendered by appellees' Black Book, by reason of which appellant is before this Court.

Hohreiter v. Garrison, 81 Cal. App. 2d 384, 184 P. 2d 323, cited by appellees (Br. 29) can scarcely give them comfort. That was a license revocation case, in which the licensee was given a full hearing with all the usual rights pertaining thereto, before a hearing examiner. The question in the case was whether the entire administrative board itself must review the record or was permitted to accept the hearing officer's recommendation. Because the licensee had had a full hearing coupled with judicial review in which the Court itself rendered an independent judgment based upon a full consideration of the entire record, it was held there was no denial of due process. But the licensee did, indeed, have a full administrative hearing. Here, there was none. The fact that appellant has come to court complaining of appellees' denial of due

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6/ (Continued): most respectfully, Judge Pope's misapprehension is further shown by his suggestion (ibid) that the case involved a problem of "loaded dice, marked cards and other means of cheating or otherwise disrupting the orderly conduct of the licensed gambling." This simply has nothing to do with the case and appellees have never said nor claimed that it does. Certainly, they have adduced no evidence in that regard.

process can scarcely extricate appellees.

Appellees continue (Br. 30-31) to talk about -- in this instance, to speculate about -- what the Nevada courts might do. Again we point out, this disregards the decision by this Court in this case and also the teaching of Monroe v. Pape, 365 U.S. 167, 5 L. ed. 2d 492, 81 S. Ct. 473.

(4)

Appellant Was Denied Equal Protection of The Laws (Reply to Appellees' Point IV, pp. 31-34).

If appellees had adduced evidence to support their concepts (Br. 31), or their Black Book conduct was directed to gambling or gambling activity instead of with the right to sleep, an argument as to proper classification might be made. Whether it would be sufficient, having in mind the State's burden in such a case, would depend upon the showing made. But appellees have made no showing. Their ipse dixit, the fact that they have done it, does not substitute for proof.

Appellees' quotation (Br. 33) from 77 C. J. S. 403 is out of context. The sentence is from the C. J. S. article on the Right to Privacy. The general question being considered in the article is the right to damages when the details of one's life are made public. The particular case cited in support of the C. J. S. quotation (Hodgemen v. Olsen, 86 Wash. 615, 150 Pac. 1122) had to do with whether a person convicted of a felony could obtain a court order requiring the destruction of the pictures that were taken of him when he

entered the penitentiary and preventing their distribution to law enforcement officers. It was in relation to this, that the C. J. S. statement is made. Certainly the statement, as appellees have set it out, is too all encompassing. Conviction of a felony does not "forfeit whatever right of privacy (the convicted person) may be said to have ever possessed." It does not, for example, declare open season on the individual and allow anyone who wants to, to poke him in the nose, nor does his home lose the protection of the Fourth Amendment. It may be that the newspapers may comment upon the fact of his conviction, or law enforcement officers may circulate his picture (but cf. York v. Story, 324 F. 2d 450 [this Court, 1963], cert. den. 376 U. S. 939, 11 L. ed. 2d 659, 84 S. Ct. 794), but he remains a person, a citizen; all laws have not been repealed as to him; he does not become a Pariah.

The fact that there are laws which deprive a person convicted of a felony of the right to vote, does not meet the problem here. 7/ As yet, there are no valid laws which deprive him of the right to sleep.

Moreover, appellant has been denied equal protection in still another way. Appellees claim that their treatment of appellant is "to keep the hoodlum element away from the gaming industry." (Br. 19). Yet the record is clear that men with "extensive police records" (RT 59), who "formerly had unsavory reputations" (RT 67), and who had "criminal records" (RT 63), all of which was and

7/ Incidentally, the validity of such laws is being tested in a case now before the California Supreme Court (Otsuka v. Hite, #L A 28537).

is known to appellees (RT 57, 59, 63), actually have gambling licenses from appellees (ibid). It hardly can be said to be equal treatment and proper classification to say that such persons may be licensed by appellees to run the very gambling establishments themselves, but that appellant may not even buy a shirt at a store open to the public on the premises.

(5)

Appellant Has Standing To Sue (Reply to Appellees' Point V, pp. 34-37).

Appellees sacrifice substance for form when they say that appellant is affected here only indirectly. It is pretty direct action for appellees to say that appellant shall be excluded from the entire premises and to tell the hotel owners to exclude him on pain of loss of license. It is, in effect, the same as though appellees had told one of their employees to seize and evict appellant from the hotels on pain of the employee's loss of job.

But even if it is considered that appellant is affected here only indirectly, that fact does not bar protection of appellant's constitutional rights. (Greene v. McElroy, 360 U.S. 474, 493, 3 L. ed. 2d 1377, 79 S. Ct. 1400; Watkins v. United States, 354 U.S. 178, 198, 1 L. ed. 2d 1273, 77 S. Ct. 1173; Boynton v. Virginia, 364 U.S. 454, 5 L. ed. 2d 206, 81 S. Ct. 182). Indeed the civil rights act by its very terms answers appelles' indirection point. It says (42 U.S.C. 1983): "Every person who ... subjects, or causes to be subjected ... shall be liable...." (emphasis added).

Webb v. State University of New York, 125 F. Supp. 910 (ND NY 1954), app. dism. 348 U.S. 867, 99 L. ed. 683, 75 S. Ct. 113, the only case relied upon by appellees, is inapposite. Suffice to say that appellees' directive to the licensees here was not merely "incidental".

The fact that the appellees set the action in motion, only to be carried out by others, does not prevent appellant, who was affected thereby, from securing redress or relieve the appellees of their responsibility for causing the damage. (NAACP v. Alabama, 357 U.S. 449, 463, 2 L. ed. 2d 1488, 1500, 78 S. Ct. 1163).

In Schempp v. School District of Abington, 177 F. Supp. 398 (ED Pa. 1959), a suit under the Federal Civil Rights Act, the state statute required the reading of the Bible in school. Failure of the school teacher to do so or to see that it was done was cause for discharge. Nevertheless, the court held that the parents of students in attendance at school had the right to, and did successfully, attack the statute.

In Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 227 P. 2d 449, the plaintiff was ejected from the race track by the stewards thereof, similarly under pain of the track's loss of license if this were not done. Nevertheless the court sustained the plaintiff's right to sue. (See quotation pp. 43-44 of Appellant's Opening Brief; it is likewise applicable here.)

Truax v. Raich, 239 U.S. 33, 60 L. ed. 131, 36 S. Ct. 7, was a case where the state statute prohibited an employer from hiring aliens. Criminal penalties attached to the employer who so

did. No sanctions were imposed on the employees. Nevertheless in his suit in federal court for violation of constitutional right, the employee was held to have the right to sue; and sue he did -- successfully.

In Greene v. McElroy, 360 U.S. 474, 3 L.ed.2d 1377, 79 S.Ct. 1400, an employee of a private employer which had a government contract was denied security clearance by the government. As a result thereof and not at the direction or behest of the government, the private employer discharged the employee. On the question of whether the employee had any right to relief from the government's action in light of the fact that the private employer, not the government, discharged, the court said (360 U.S. at 493, f.n. 22):

> "We note our agreement with respondents' concession that petitioner has standing to bring this suit and to assert whatever rights he may have. Respondents' actions, directed at petitioner as an individual, caused substantial injuries, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 152, 92 L.ed. 817, 843, 71 S.Ct. 624 (concurring opinion), and, were they the subject of a suit between private persons, they could be attacked as an invasion of a legally protected right to be free from arbitrary interference with private contractual relationships. Moreover, petitioner has the right to be free from unauthorized actions of government officials which substantially impair his property interests. Cf. Philadelphia Co. v. Stimson, 223 U.S.

605, 56 L.ed. 570, 32 S. Ct. 340."

Accordingly, appellees' argument that appellant is entitled to no protection because he is "indirectly" affected must be rejected.

It is always an intriguing exercise to set up a straw man and then demolish it. This is what appellees have done with their example concerning the twenty-one year old (Br. 37). The difficulty is the analogy suggested is not apposite. A prohibition against a minor being in a gambling establishment is relevant to the minor's own protection and the classification is reasonable. The same cannot be said in the case at bar. As to the appellees' mistake in stating that John Doe was under 21, that is not our case here. Appellees are making no mistake; their action is quite designed.

Furthermore, appellees' suggestion of the under 21 situation, in the light of the undenied facts in this case, demonstrates the unconstitutional broadness of their conduct. In the record in this very case, it is shown that it is possible to keep unwanted persons in the form of children out of the gambling rooms and no difficulty is encountered (RT 169).

(6)

Comment on Appellees' Argument re Appellant's Opening Brief and Conclusion (Reply to pp. 37-46).

Most respectfully, we think it only proper to suggest that appellees stultify themselves (Br. 37) when they refuse to now acknowledge in the face of the uncontradicted evidence that their purpose in picking up the dice and cards was because of the presence

of appellant and to enforce the Black Book and letter (see RT 81-84). It was appellee Abbaticchio who said (RT 84) "we are going to examine their dice and cards and possibly they will get the message." The English language cannot be made plainer.

Appellees have refrained, with one exception, from discussing any of the authorities cited by appellant in his opening brief. As to some, appellees dismiss them with the phrase (Br. 40) "because they obviously involved arbitrary discrimination on the question of color alone." But this does not solve appellees' problem. The constitutional protection against arbitrary discrimination is not limited to color alone. 8/ As to the other cases, appellees say naught save as to one (Br. 43) or only that they make interesting reading (Br. 42). However, the principles enunciated by the cases cited by appellant cannot be ignored, nor will they go away simply by failing to acknowledge their existence.

Appellees' entire argument may be said to be bound up in this one sentence (Br. 41): "obvioulsy the welfare of the other citizens in the State of Nevada and the gambling industry can only be protected by keeping plaintiff and his kind away from our industry." If that be "obvious", appellees have pointed to no facts in the record to show it. But even if it be so, then their efforts

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8/ Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459, 81 L.ed. 1223, 57 S.Ct. 838; Smith v. Cahoon, 283 U.S. 553, 75 L.ed. 1264, 51 S.Ct. 582; Mayflower Farms v. Ten Eyck, 297 U.S. 266, 80 L.ed. 675, 50 S.Ct. 457; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 86 L.ed. 1655, 62 S.Ct. 1110; Baker v. Carr, 369 U.S. 186, 7 L.ed. 2d 663, 82 S.Ct. 691; Gideon v. Wainwright, 372 U.S. 335, 9 L.ed. 2d 799, 83 S.Ct. 792.

must be scalpeled to that end: Keeping appellant away from the industry. The blunderbuss approach will not pass constitutional muster.

In connection with appellees' allusion (Br. 42) to the Nevada remedies, we have previously commented upon appellees' disregard of the Court of Appeals' opinion in this case and Monroe v. Pape, 365 U.S. 167, 5 L.ed.2d 492, 81 S.Ct. 473.

We do not understand this case to involve the question of the teaching which should be given to children (see appellees' Br. 42). It does involve constitutional right and we have previously shown how appellees' concept of the right to privacy is not the law of the land.

Appellees are mistaken in their suggestion (Br. 43) that Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 227 P. 2d 449, is, in the light of Flores v. Los Angeles Turf Club, 55 Cal. 2d 736, 361 P. 2d 921, no longer the law in California. Of course, in a sense, appellees' statement is correct because the state legislature in the light of Orloff changed the law (see 55 Cal. 2d at 741) to comport with constitutional standards, thus enabling the court to reach the conclusion it did in Flores. But absent the change in the law, Orloff remains. There is no suggestion in Flores that Orloff was wrongly decided. The court pointed out (55 Cal. 2d at 741) that this change in the law "gives rise to considerations not present in Orloff."

The difficulty with appellees' position is that appellees are covered by Orloff, except that appellant's case is here stronger because the premises here are not just a horse racing enclosure

where only horse racing is conducted, but vast acres of ground where all kinds of human activity are provided.

Appellees' reply to appellant's contention that they have made no showing of what evil would result from the law abiding presence of appellant on the non-gaming portions of the premises consists of two sentences on page 44 of their Brief. Presumably, this is the sum total of the showing appellees believe they have made. It is, we submit, inadequate. The first sentence of appellee's showing reads: "The record is replete with statements of witnesses with respect to the dangers incident to the presence of musclemen on any portion of the premises." Not one single reference to the record is given for this assertion. Appellant submits that there is no evidence in the record having any factual base whatever, of any showing of evil or danger because of the presence of appellant or, if you will, "of musclemen" on any portion of the premises, and certainly there is no evidence of danger or evil from appellant's presence on the non-gambling portion. This, of course, explains the absence of any record reference to support appellees' sweeping statement.

The second, and last, sentence of appellees in support of their "showing" of evil from appellant's presence anywhere on the premises is (Br. 44) "that the possibility of people winning large sums of money and then being robbed by people of the type appellant seems to be exists." 9/ (emphasis added).

9/ The record references cited in support are these: RT 70, lines 2-5, where appellee Abbaticchio testified as to the reasons for the promulgation of the Black Book, not as to facts of anything that had occurred, that "if an unsavory character were to

(Continued)

With due respect, we submit that "possibility" (to say nothing of there being no factual showing for the assertion) is simply not sufficient a base to permit infringement upon personal constitutional right. (Sherbert v. Verner, 374 U.S. 398, 407-408, 10 L. ed. 2d 965, 83 S. Ct. 1790, and cases cited). "Discriminations cannot be supported by mere fanciful conjecture." (Hartford Steam Boiler etc. Co. v. Harrison, 301 U.S. 459, 462, 81 L. ed. 1223, 1226, 57 S. Ct. 838). "[T]he law deals in probabilities not possibilities." (State v. McLaughlin, Oh. Ct. App. December 9, 1965, 34 U.S. Law Week 2323-2324).

Moreover, it is manifest that this argument by appellees is mere makeweight. Appellees were not concerned with the possibility of holdup -- they did not contend that ordinary law enforcement could not handle any situation -- it was the "good name of the legal gambling industry in the State of Nevada" which appellees were trying to protect (RT 33). Laudable as this objective may be, it is not sufficient, absent a factual showing, to override appellant's constitutional right, nor to excuse the State from being so sweeping in its regulation. (Sherbert, supra).

Though appellees have tried (Br. 44-45), they have not

9/ (Continued): be permitted to frequent the place, he might engineer or brand a stickup;" (emphasis added) and RT 108, lines 2-14, where Mr. Abbaticchio testified, "it was our feeling that with the records some of these people had, not all of them, the notoriety they had achieved in criminal circles, that it was not beyond the realm of possibility, that they might be pinpointing or spotting people who had made large winnings and the possibility of the information being given to confederates; that there might be holdups, the crime rate might go up. This was one of the considerations that we had in mind; yes." (emphasis added).

succeeded in explaining why "hoodlums and gangsters" (Br. 45) who have licenses are, so long as they "conduct ... themselves properly" (Br. 44) permitted to keep them and actually engage in conducting gambling under the aegis of appellees themselves, but that appellant, for the protection of the gambling industry, may not even take his wife to see a show that is open to the public.

Appellees conclude their brief by expressing wonderment (Br. 45) that appellant would have deigned to bring this suit. Appellees' words are: "it seems almost inconceivable that a man with the criminal background and obvious propensities of the plaintiff in this case would bring such an action." Appellant does not understand what appellees mean by such a statement. He does know, however, that he is a citizen of this land and entitled to be treated as such. He knows that under our system, if a man commits a crime he is charged therewith and the State produces evidence against him. And he also asserts that so long as he is violating no law nor injuring others, he has the right to be let alone. Appellees are apparently unfamiliar with the following statement by the Court of Appeals for the Second Circuit in United States v. Seeger, 303 F. 2d 478, 485(1962):

> "... We are not inclined to dismiss lightly claims of constitutional stature because they are asserted by one who may appear unworthy of sympathy. 'Once we embark upon short cuts by creating a category of the "obviously guilty" whose rights are denied, we run the risk that the circle of the unprotected will grow.' U. S. v. Tribote, 297 F. 2d 598, 604 (2d Cir. 1961)."

Appellant is entitled to protection here.

II

RESPONSE TO BRIEF OF NON-STATE APPELLEES

Preliminary Statement

The Trial Court was correct in its finding (XLVIII, CT 187) that the conduct of these appellees amounted to State action under color of State law. Whether these appellees can complain of this finding, they not having taken a cross-appeal (see Annotation: Failure to Cross-Appeal as Affecting Scope of Appellate Review, 1 L. ed. 2d 1820), need not be here decided. The finding is clearly supported by the evidence.

Appellees are incorrect in their assertion (Br. 4) that appellant is seeking damages only against them and not against the State defendants. Appellant seeks damages against both (Appellant's Op. Br., Appx. B-10-11).

A.

Appellant Was Ousted By Appellees (Reply To Appellees' pp. 4-6).

Appellees' suggestion that appellant simply acceded to a "request" by their security officer and therefore that appellant acted "voluntarily" is simply to shut one's eyes to what all can see. Appellees' own witnesses testified (e. g. RT 165) as to how appellant did not want to leave and said he would sue and started to leave when "the deputy came over".

This is sufficient. In United States v. Di Re, 332 U. S. 581, 594, 92 L. ed. 210, 220, 68 S. Ct. 222, in answer to the Government's argument that consent to a search can be inferred from an individual's failure to protest an arrest and to silently go along with the policeman to the police station, the Court said:

> " . . . [C]ourts will hardly penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law. . . . It is likely to end in fruitless and unseemly controversy in a public street, if not in an additional charge of resisting an officer. . . .
>
> "It is the right of one placed under arrest to submit to custody and to reserve his defenses for the neutral tribunals erected by the law for the purpose of judging his case. . . ."

So here. Appellant made it amply clear he was not leaving voluntarily and was reserving his right to go to court for vindication of his rights. Appellees can hardly be heard to say, on this record, that appellant was not coerced. The fact that appellant stopped short of "unseemly controversy" redounds to his credit, not to his detriment.

B.

Appellees Acted Under Color of State Law (Reply to pp. 7-16)

Appellees strain mightily to prove that which no one contests, namely that the Fourteenth Amendment does not apply to individual

action, but only to state action. But appellees do not come to grips with the question of what is state action. As Shelley v. Kraemer, 334 U.S. 1, 20, 92 L.ed. 1161, 68 S.Ct. 836, cited by appellees (Br. 7) points out:

> " ... State action, as that phrase is understood for the purposes of the Fourteenth Amendment refers to exertions of state power in all forms...." (emphasis added).

And this means, of course, "either by its legislative, its executive, or its judicial authorities." (Virginia v. Rives, 100 U.S. 313, 318, 25 L.ed. 667, 669).

Therefore, when appellees carried out the commands of the State, rather than resist same and act as individuals, they, as individuals, admittedly having no cause and no desire to oust appellant from the premises, were indeed acting for and as the State. There is no other way to look at it.

Detailed analysis of each of the cases cited by appellees would not seem to be necessary. The principle announced in Burton v. Wilmington Parking Co., 365 U.S. 715, 721, 6 L.ed.2d 45, 81 S.Ct. 856, also cited by appellees (Br. 13) demonstrates appellant's point:

> " ... Private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it...." (emphasis added).

And so there, where the only state participation was that it leased

the property which was operated as a restaurant by a private lessee for private profit who, because of his own personal predelictions, acted as he did and refused service, the court held state action was involved and the plaintiff was entitled to an order admitting him to this "private" restaurant. How much more clear is the state involvement in the case at bar when appellees acted solely at the behest of and did the bidding of the State.

It is submitted that if State action be involved by a restaurant owner in a case such as Lombard v. Louisiana, 373 U.S. 267, 10 L. ed. 2d 338, 83 S. Ct. 1122, then, of course, state action is involved at bar through these appellees. In Lombard, a restaurant owner asked the individuals, three Negroes and one White, to leave. When they did not, the manager called the police and the defendants were charged with malicious mischief. 10/ Although there was no state statute, nor any city ordinance, the court found the restaurant owner's conduct to be state action simply because the Superintendent of Police had publicly stated that the student sit-in demonstrations were not in the public interest and that the police department would enforce all laws. In addition the Mayor of New Orleans had publicly stated that he had directed the superintendent of police to allow no more sit-in demonstrations and that they should cease and be prohibited.

The Court said that "a state, or a city, may act as authoritatively through its executive as through its legislative body." (373

10/ Various charges have been leveled in the sit-in cases, e.g., trespass, disturbing the peace, etc.

U. S. at 273) and held the restaurant owner's conduct to be State action.

Similarly, then, is appellees' conduct here.

This is so, even under the Civil Rights Cases themselves, 109 U. S. 3, 17, 27 L. ed. 836, 841: "[T]he wrongful act of an individual [is not state action] . . . if not sanctioned in some way by the State, or not done under state authority . . .[It is state action, however, if] the evil or wrong actually committed rests upon some state law or state authority for its exercise and perpetration." See also, generally, Abernathy, Expansion of the State Action Concept under the 14th Amendment, 43 Cornell L. Q. 357, 377; Lewis, The Meaning of State Action, 60 Columbia L. R. 1083, 1089; Van Alstyne & Karst, State Action, 14 Stan. L. R. 3.

The thrust of appellees' argument seems to be (Br. 3-4) that because they acted pursuant to the coercion of the State defendants, they are not liable for the damage inflicted upon appellant. This type of contention was early laid to rest by the Supreme Court in Little v. Barreme, 2 Cranch (U. S.) 170, 177, 2 L. ed. 243, 246, a case involving a suit for damages against a Sea Captain who seized a ship acting on orders from the President of the United States. Speaking for the Court, Mr. Chief Justice Marshall said:

> "I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. ... That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system,

appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. ... But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass."

See also, Kilbourn v. Thompson, 103 U.S. 168, 26 L. ed. 377.

C.

Diversity of Citizenship Furnishes an Alternative Ground For Recovery by Appellant Against the Non-State Appellees.

Although we believe incorrect, as we have shown, the non-State appellees' argument that because they acted pursuant to the instructions of the State appellees, this, somehow, makes their conduct not under color of State law, yet if that be so, it does not aid them. This, because the non-State appellees are then thrown into the situation of having acted as private individuals who, under Nevada law, are liable to appellant for their conduct.

Appellees concede (Br. 1) that the Trial Court had jurisdiction, as it found (CT 174), under the diversity of citizenship section. (28 U.S.C. 1332 [a] [i]). Nevada law therefore applies.

Appellees run a hotel to which the public is invited. They

refused service to appellant although he was conducting himself properly. Thus, the case is simply that of the inn-keeper's obligation to afford service. Under Nevada law, appellant is entitled to recover.

Section 651.020 N.R.S., provides:

> "Every owner or keeper of any hotel, inn, motel, motor court or boarding house or lodging house in this state shall have the right to evict from such premises anyone who acts in a disorderly manner or who destroys the property of any such owner or keeper or who causes a public disturbance in or upon such premises."

Section 233.010 N.R.S., provides in part:

> "Declaration of Public Policy of State....
>
> "It is hereby declared to be the public policy of the State of Nevada to protect the welfare, prosperity, health and peace of all people of the state and to foster the right of all persons reasonably to seek, obtain and hold employment and housing accommodations and reasonably to seek and be granted service in places of public accommodation without discrimination, distinction or restriction because of race, religious creed, color, national origin or ancestry." 11/

11/ Apparently (RT 546) this section was added in 1961. This does not of course detract from appellant's innkeeper argument based upon the other Nevada statutes nor, indeed, does this mean that prior to the 1961 enactment, Nevada law was to the contrary. Indeed, all the section did was codify in the employment, housing and public accommodations fields what had always been the law as to innkeepers. Brown v. Brandt (1902), I.K.B. 696, 698; Bowlin v. Lyon, 67 Iowa 536, 538-539, 25 N.W. 766, and cases cited infra at the end of the last paragraph of this section.

Section 1.030 N.R.S. provides:

"The common law of England so far as it is not repugnant to or in conflict with the Constitution and laws of the United States or the Constitution and laws of this state shall be the rule of decision in all the courts of this state."

And Section 447.010 N.R.S. states:

"Hotel Defined":

"Every building or structure kept or used as or held out to the public to be a place where sleeping or rooming accommodations are furnished to the transient public, whether with or without meals, shall, for the purpose of this chapter, be deemed to be a hotel and whenever the word 'hotel' shall occur in this chapter it shall be deemed to include a lodging house or rooming house where transient trade is solicited."

Finally, In re Breckenridge, 34 Nev. 275, 277, 118 Pac. 687, holds that a hotel in Nevada is an inn.

Accordingly, the non-state appellees, having failed to discharge their innkeeper responsibility to appellant, are liable to him for damages. (3 Blackstone's Commentaries 164; Civil Rights Cases, 109 U.S. 325; Mateer v. Brown, 1 Cal. 221, 230, 52 Am. Dec. 303; Bowlin v. Lyon, 67 Iowa 536, 538-539, 25 N.W. 766; Kisten v. Hildebrand, 48 Ky. (9 B. Mon.) 72, 74, 48 Am. Dec. 416; Atwater v. Sawyer, 76 Me. 539; Markham v. Brown, 8 N.H. 523, 528, 31 Am. Dec. 209; DeWolf v. Ford, 193 N.Y. 397, 401, 86 N.E. 527; Grinnell v. Cook, 3 Hill (N.Y.) 485, 488, 38 Am. Dec. 663;

Bennet v. Mellor (1793), 5 T.R. 273, 276, 101 Eng. Rep. 154, 155; Robins & Co. v. Gray (1895), 2 Q.B. 501, 504, 507, 508. See also, Hervey v. Hart, 149 Ala. 604, 42 So. 1013.)

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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A. L. WIRIN

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Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Fred Okrand

FRED OKRAND

NO. 20137

IN THE UNITED STATES COURT OF APPEALS

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Appellant,

vs.

IMMIGRATION AND NATURALIZATION
SERVICE, LOS ANGELES DISTRICT;
George K. Rosenberg, as District Director,

Respondent.

BRIEF OF RESPONDENT

APPEAL FROM
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CENTRAL DIVISION

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Respondent.

BRIEF OF RESPONDENT

JURISDICTION

The District Court had jurisdiction of the within cause pursuant to 28 U.S.C. 2241 et seq., and §106(b) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1105a(b).

This Court has jurisdiction of the within cause pursuant to 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant, a 54-year old native and citizen of Mexico, originally entered the United States for permanent residence in

1916 (R. 8(a)). [1] He left the country in 1943, and remained outside the United States until June 12, 1961, when he was paroled into the United States for a period of three days to attend the funeral of his mother-in-law. (R. 8(a)). Subsequently, an exclusion proceeding was conducted and on October 4, 1961, the Special Inquiry Officer ruled that he was an excludable alien under the provisions of Section 212(a)(20) of the Immigration & Nationality Act of 1952, 8 U.S.C. 1182(a)(20), as an immigrant not in possession of a valid immigration visa. Appellant's administrative appeal from the exclusion order was dismissed by the Board of Immigration Appeals on November 20, 1961. (R. 8(a), 9, 10).

Thereafter, appellant filed a motion with the Board to reopen the exclusion proceedings permitting him to make application under Section 212(c) of the Immigration & Nationality Act, 8 U.S.C. 1182(c), or Section 211(b), 8 U.S.C. 1181(c), for a waiver of the entry documents required of immigrants. In this connection appellant contended that he had never relinquished his residence in the United States and that his absence therefrom was not voluntary and only temporary in nature. Appellant argued that his departure from the United States for eighteen years was temporary and involuntary in that it was the result of a natural compulsion to attempt to locate his mother who had disappeared. On January 30, 1964, the Board denied his motion to reopen,

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1/ R. refers to pages of the certified Administrative Record of the Immigration & Naturalization Service relating to appellant and heretofore filed with this Court.

holding that his absence of approximately eighteen years could not be considered temporary within the meaning of either Section 211(b) or 212(c). The Board held in effect that the appellant was statutorily ineligible for the relief sought and that accordingly no purpose would be served in ordering the exclusion proceedings reopened.

On February 28, 1964, the District Court for the Southern District of California dismissed appellant's declaratory judgment action, holding that his remedy, if any, was habeas corpus. Appellant filed a complaint for writ of habeas corpus in the United States District Court for the Southern District of California on March 24, 1964. Judgment was entered on October 5, 1964, denying the writ of habeas corpus. Appellant now appeals from this judgment of the District Court denying the writ of habeas corpus.

ISSUES PRESENTED

1. Was appellant denied the opportunity to present evidence during his exclusion proceedings that his eighteen year stay in Mexico was a temporary departure within the scope of Sections 211(b) and 212(c) of the Immigration & Nationality Act of 1952?

2. Is appellant eligible for the discretionary relief afforded by Sections 211(b) and 212(c) of the Immigration and Nationality Act of 1952?

STATUTES INVOLVED

Section 212(a)(20) of the Immigration & Nationality Act, 8 U. S. C. 1182(a)(20) provides in pertinent part:

> "(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> "(20) Except as otherwise specifically provided in this chapter any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(e) of this title."

Section 212(c) of the Immigration & Nationality Act, 8 U. S. C. 1182(c) provides in pertinent part:

> " . . . (c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful

unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) - (25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title."

Section 211(b) of the Immigration & Nationality Act, 8 U.S.C. 1181(c) provides in pertinent part:

"(c) The Attorney General may in his discretion, subject to subsection (d) of this section, admit to the United States any otherwise admissible immigrant not admissible under clauses (2), (3), or (4) of subsection (a) of this section, if satisfied that such inadmissibility was not known to and could not have been ascertained by the exercise of reasonable diligence by, such immigrant prior to the departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory, or, in the case of an immigrant coming from foreign contiguous territory, prior to the application of the immigrant for admission."

ARGUMENT

I

APPELLANT WAS GIVEN THE OPPORTUNITY TO PRESENT EVIDENCE DURING HIS EXCLUSION PROCEEDING THAT HIS EIGHTEEN YEAR STAY IN MEXICO WAS A TEMPORARY DEPARTURE WITHIN THE SCOPE OF 211(b) AND 212(c) OF THE IMMIGRATION & NATIONALITY ACT.

Appellant had the opportunity to present evidence on the nature of his departure to Mexico but the record demonstrates the failure of appellant and his counsel who has represented him throughout the course of these proceedings to make a timely presentation of that and supporting arguments at the hearing before the Special Inquiry Officer in 1961. The resultant decision of the Special Inquiry Officer, dated October 4, 1961, clearly demonstrates that appellant only sought a delay in his exclusion until Congress had an opportunity to take action on a private bill which would have permitted appellant to be admitted to permanent residence notwithstanding the provisions of Section 212(a)(22) of the Immigration & Nationality Act, 8 U.S.C. 1182(a)(22). In other words, on October 4, 1961, when the appellant was ordered excluded and deported from the United States as charged, his claim of status as a lawfully returning resident alien could have been made and adjudicated. His failure to do so was tantamount to a confession on his part that he was not a returning resident alien at all. This position is further established by the fact that appellant almost immediately thereafter caused a private bill HR 8298,

to be introduced into the Congress of the United States on July 12, 1961, which provided as follows:

> " . . . That notwithstanding the provisions of Section 212(a)(22), 8 U.S.C. 1182(a)(22) of the Immigration & Nationality Act, Henry Gamero may be issued a visa and admitted to the United States for permanent residence if he is found to be otherwise admissible under the provisions of the Immigration & Nationality Act. . . . "

This bill was acted upon adversely by the Congress on July 25, 1963. The appellant's departure from the United States in 1943, during a time when the United States was exerting every effort toward the successful termination of World War II, brought him within the excluding provisions of Section 212(a)(22) of the Immigration & Nationality Act, 8 U.S.C. 1182(a)(22), which provides as follows:

> "Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive a visa and shall be excluded from admission into the United States:
>
> "(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as non-immigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the Armed Forces in

time of war for a period declared by the President to be a national emergency, except aliens who at the time of such departure were non-immigrant aliens and who seek to reenter the United States as non-immigrants. . . ."

Appellant first sought to establish that he was a legal and permanent resident of the United States in a motion to reopen denied by the Board in an Opinion of October 10, 1963, and specifically sought relief under Sections 211(b) and 212(c) of the Immigration & Nationality Act in a motion to reopen denied by the Board in an Opinion dated January 30, 1964. Although these motions to reopen were based upon information and circumstances present and known to appellant at the time of his October 1961 hearing, the Board considered the offered evidence and denied each motion on its merits. The denials of the motions to reopen were in full accord with 8 C. F. R. 3.2 which states:

". . . Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was

fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. . . ."

II

APPELLANT IS NOT ELIGIBLE FOR THE DISCRETIONARY RELIEF AFFORDED BY SECTIONS 211(b) AND 212(c) OF THE IMMIGRATION & NATIONALITY ACT.

The exclusion order should be upheld as an absence from the United States of eighteen years cannot, under the circumstances of this case, be held to be a temporary absence. It is clear that appellant is not eligible for the discretionary relief afforded by Sections 211(b) and 212(c) of the Immigration & Nationality Act. Appellant contends that he should not be excluded from the United States because he is eligible for a waiver of the documentation requirements. He contends, contrary to the Board's finding, that his eighteen years absence from this country was temporary. In this connection a grant of Section 211(b) or 212(c) relief is ultimately a discretionary determination entrusted to the Attorney General, such determination being subject to judicial review only on a showing of clear abuse of discretion. Jay v. Boyd, 351 U.S. 345, 353, 354 (1956). Judicial review of these decisions is governed by Section 106(b) of the Act, 8 U.S.C. 1105(a)(b). Habeas corpus review of exclusion orders has generally been

limited to the review of the administrative record, Gordon and Rosenfield, Immigration Law & Procedure (1963), Section 8.7(g), pp. 835-7.

Appellant, in his complaint for writ of habeas corpus, states that in April of 1943 he went to Mexico to locate his mother, that he found her in an insane asylum, that in 1953 his mother died, that he made efforts to return to the United States and in 1961 was paroled into the United States. This can hardly be viewed as a temporary absence from this country. Section 211(b) of the Immigration and Nationality Act, 8 U.S.C. 1181(b) reads:

> "Notwithstanding the provisions of Section 1182(a)(20) of this title, in such cases or such classes of cases and under such conditions as may be by regulation prescribed, otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily may be readmitted to the United States by the Attorney General, in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation."

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) reads:

> "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation,

and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . ."

The Board of Immigration Appeals found that there was no merit in the argument that appellant's departure from the United States was involuntary and the result of a natural compulsion and driving force in trying to locate his mother who had disappeared years previously from Los Angeles, California. Furthermore, the Board found that his remaining outside the United States for almost twenty years was not persuasive of the fact he departed temporarily. The case was differentiated from Rosenberg v. Fleuti, 374 U.S. 449 (1963), as this long departure cannot be considered an innocent, casual, and brief excursion into one's native country.

8 C.F.R. Section 211.1 defines temporary absence in terms of a period of time not exceeding one year. This one year is a guideline. Prior regulations have used different periods of time. For example, in Lindonnici v. Davis, 16 F.2d 532 (1920) the regulations in effect defined temporary absence as not exceeding six months. The Court stated in regard to this regulation, at page 534:

"In our opinion this rule is not unreasonable in its application to the circumstances of this case. Hee Fuk Yuen v. White (CCA) 273 F. 10; U.S. ex rel. Randazzo v. Tod (CCA) 297 F.215. The record

discloses that Lindonnici was absent for about three years before his return to the United States; Desiderio about three years; Condioti about nine years; Finaro about eight years. Accordingly, the periods of absence of the plaintiffs were not 'temporary' under the statute and regulations. . . ."

The Second Circuit has spoken conclusively on what it considers a temporary visit, in United States ex rel Lefto v. Day, 21 F. 2d 307 (2nd Cir. 1927). The Court stated at pages 308-9:

> "Without attempting a complete definition of 'a temporary visit,' we may say that we think the intention of the departing immigrant must be to return within a period relatively short, fixed by some early event."

In addition, the Ninth Circuit has addressed itself to this question in Tejeda v. Immigration & Naturalization Service, 346 F. 2d 389 (1965). Although the Court of Appeals remanded the case for further fact-finding, it is significant to note that the majority opinion states in passing (at page 393) that an eighteen month absence might not be temporary within the applicable statutes and regulations. It cannot be said under the circumstances of the case at bar that an absence of eighteen years from the United States is a temporary absence.

CONCLUSION

WHEREFORE, for the reasons set forth above, it is respectfully submitted that this Court should render its decision in favor of respondent and against appellant, affirming the judgment of the District Court in denying the petition for a writ of habeas corpus.

DATED: October 29, 1965.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and, in my opinion, the foregoing Brief is in full compliance with those rules.

/s/ Jacqueline L. Weiss
JACQUELINE L. WEISS

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Appellee.

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Appellee.

APPELLANT'S REPLY BRIEF.

Respondents' Reply Brief stresses the main point that the long absence of appellant can only give rise to but one conclusion that he intended to abandon his California residence or domicile and not to return to this country.

Of course, the length of absence is a factor to be considered in such a determination. But it is not the only factor nor the controlling factor. Conduct may be conducive of more than one reasonable conclusion.

Here we are dealing with intent. Intention being a subjective state of mind requires us to a forced determination of it by objective standards and applications predicated on the established actions and causes of conduct surrounding the subject in the pertinent period.

Things happen according to the ordinary causes of nature and the ordinary habits of life with but few

exceptions. Man's conduct is principally and primarily controlled by the conditions and factors present at the time of his decisions and conduct. We generally conclude that under same and similar circumstances, persons act in but one way for is this not the basic premise of our "reasonable man" rule of law.

Therefore, without desiring to be repetitious, we must review the conduct of appellant to be able to reasonably evaluate his subjective state of mind and thereafter conclude the reasons for his conduct, the underlying thoughts resulting in his initial desire to return to Mexico, his reasons for his original stay, for his extended stay for the period of the remaining life of his aged mother, and lastly, for the continued stay in Mexico after her death.

Who is appellant and what is his background, education and experience, especially concerning the laws of the United States—his knowledge of his rights and how to obtain and protect them?

Petitioner is a native of Mexico and originally came to the United States in 1916. He is now 58 years of age. He is self educated having had but little schooling in Mexico. His conduct has been good and he always conducted himself as a law-abiding person—hard working and steadily employed and an asset to our society. He has had no experience in the law or with the law except in the subject proceeding and like many foreign born has been handicapped by a new language, and has not only a supreme respect for law and the authorities, but a basic fear of it and its enforcement.

He remained in the United States for an initial period of 27 years trying to establish himself and to create

a standard of living and an economic status which did not and could not exist for persons of his background, qualification and education in the old country.

While a lawful resident of the United States, he married his wife who is a lawful resident of the United States and there was born of said union in 1938, a son who is a citizen of the United States.

There can be no argument concerning his intention to remain in the United States during the period from 1916 to 1943 when he returned to Mexico.

All of his family—his wife, son, two citizen brothers and a lawful resident sister, were likewise domiciled in Los Angeles. Furthermore, his aged mother, his only other then living close relative, was residing in Los Angeles for the period to 1938.

In 1938, his mother disappeared—why was not then known and still is not to this day although the belief is that she was deported. To where was then not known and was not learned until he verified it by a trip to Mexico when in 1943 his aunt residing in Mexico advised him and his family that she had seen a person who appeared to be the mother of these persons living under lamentable circumstances in an insane asylum under another name.

What was the state of mind of appellant on learning of these facts—that such a person might be his aged mother—so deplorably situated after not having been heard of for over 5 years of unexplained absence and whereabouts unknown?

What do persons who are normal in their reactions having such love and respect for parents as is present especially in Latin Americans. What is then the rea-

sonable and rational course of conduct to be followed. A meeting of the family with the first consideration—immediate action first to establish her identity and secondly to return her to her loved ones—her family in Los Angeles where she was lawfully residing?

But who could best go? Of her sons and daughters, two of whom were actively in the Armed Forces of the United States at San Diego, California, the logical decision was to select the remaining brother, appellant herein, to investigate and determine such existence of his mother and to take the necessary steps and action to return her to the United States.

Attention is first directed to appellants their military status. In 1943, he was 34 years of age, married, with a minor child of 5 years of age. The draft was not taking such persons so situated and in our opinion it would be a most far fetched conclusion that he left to evade the Draft. The better and more logical conclusion is that he left with the sole purpose of determining identity and to return with his mother as soon as possible. Certainly he did not go to improve his economic status for especially during the war years his economic position was far, far better than he could, did or ever could obtain by any employment for which he was qualified in Mexico.

What else did he do before he left for Mexico? He first obtained permission from the Selective Service Draft Board for a short absence together with a leave of absence from his employment coupled with a similar leave from the school he was then attending, and a certification by the Immigration and Naturalization Service of the United States so that he could return

within a few months to his lawful residence in the United States.

He believed and it is fair to believe that he would return within this period of time—for if this person was not his mother, there was no reason to stay and if this person was his mother he sincerely believed he could have her released to him and timely return. Did this in appellant seem a reasonable intention not capable of any other conclusion for his taking such leave for such purpose. This was not the action of a man in flight with a determination and reservation not to return. His leave was voluntary and not under any Order for Deportation or pending threat thereof.

Considering his desire for the welfare, health and happiness of his aged mother, what strong feelings of pity and resentment entered his mind when he was sure that this person living in a most deplorable and lamentable condition, barefooted, clothed in dirty overalls, imbedded with animals crawling in her hair, sleeping in unclean conditions and forced to survive on an inadequate diet was his mother.

Upon such a horrible discovery, his concern and only concern was to remove her therefrom—place her in fit habitations and surroundings, take care of her as a dutiful and loving son bound not only morally but by his great love and concern, and made immediate plans to return her to the United States. Such was his sincerity of purpose.

This he did but could only go so far for he was limited in his actions in that he was required to obtain a visa for her return which upon his request to the American Consul at Mexico City, he learned was not forthcom-

ing. She was not eligible. Consequently, he believed that there was nothing he could do there to reverse such action and this poor, uninformed, law-abiding person was frantic. As far as he was concerned, this was final in respect to the return of his mother.

So he consulted with his family, and relying upon the decision and advise of the Consul, reconciled himself to this turn of fate and did the next best thing having only in mind his concern for his mother and her immediate welfare. He could not leave her after finding her—he could not abandon her to the fate of the environment of the asylum—he could not in good conscience return alone to the United States and thereafter live with his conscience as could no other decent son.

So he stayed taking care of his mother the best he could ever renewing his efforts to return her with him to the United States, consulting with the Consul and pleading her cause, all unsuccessful—all culminating with her death in 1953 in Mexico City, never having been successful, never again being with her other children and grandchildren in the United States.

Certainly, this conduct from 1943 to her death in 1953 was not that of a man in flight—of a person desiring to change his status—nor his residence nor his domicile.

Contrariwise, these were the actions of a man desperately trying to afford his mother the love and attention of a considerate son, with the ultimate, hope, desire and intention to return her to her relatives in her old age. Did this in appellant seem unreasonable, unwarranted—were these actions and attitudes capable of

any other inferences or conclusions except but to return to the United States?

Heartbroken—disappointed and perhaps somewhat resentful, appellant proceeded with the next logical phase in his action. All reasons for his remaining in Mexico having likewise died with the death of his mother, all reasons for his being now situated again in the United States, he made plans to return.

With his limited knowledge of law and authority, he realized he would need some papers to be able to return so he went to the American Consul in Mexico City. That such matters are handled by this authority is common knowledge especially to the peasantry trying to migrate to a foreign land.

After failing in his efforts to return his mother, he now was apprised by the Consul that the price he was to pay for his love and affection and continued loyalty to her was his loss of eligibility to secure his own return. Limited in the use of the English language as well as in his knowledge of the American law he rightfully relied upon this determination of his status for what other action could he take for in his limited reasoning and knowledge the Consul's decision was final.

Nevertheless he had a duty to his family—his wife and child in addition to the great love and affection he continued to have for them. They were entitled to stay in the United States and he wanted not only the benefits of the American democracy for himself but more important, for his wife and citizen child.

Subsequently he applied for entry at San Ysidro and was refused and thereafter was paroled to the United

States Immigration and Naturalization Service on or about June of 1961, where he has been physically present in Los Angeles, California, with his wife and son.

Truly the absence is long in years but not in the life and affairs of a man confronted with these circumstances. Nevertheless these unusual and trying circumstances must overcome any other inference, presumption or conclusion. Temporary is at best a nebulous word. It is at best a word of indefiniteness and must be viewed in the light of the existing facts and circumstances then prevailing.

Presumptions even in the law vary in the particular field. In our legal considerations we increase or decrease the years before we create one, and we generally only create one by lapse of time when no other evidence or logical explanation is forthcoming. But except in very few situations, is it not to be overcome by the true facts which override its arbitrary creation?

In all cases cited by respondent, in all the decisions examined, the controlling factor is the circumstances of each subject case.

What conclusion as a reasonable man can be drawn in the subject matter in the light of the true circumstances of the subjective intention of the particular person in whose actions we are concerned?

We do not believe the law desires nor intends to create an artificial conclusion of a state of mind in utter disregard of the circumstances then actually existing which gave rise to his decisions and actions. That is, we say that regardless of this evidence—these facts, these actions—this conduct, too much time having

passed, we conclude arbitrarily that your state of mind was otherwise and that therefore objectively as reasonable men we must conclude that in our mindreading of your subjective intention you thereby intended to abandon your American family residence and domicile.

We are led to the privilege of indulging ourselves in an example which we have never forgotten presented to us by the late professor, William Herbert Page of the University of Wisconsin Law School and a recognized authority on Contracts, Wills, Constitutional Law and many other subjects.

Speaking of comparisons, inferences, conclusions and our arbitrary use of words and their meanings as well as positions taken by us, he illustrated:

A pile of sand was situated at place A. A colony of ants going back and forth to and from it from place B, removed the grains one at a time. He queried: When does place A cease to be a pile and place B become a pile of sand?

Can it therefore be rationalized that either two years or seven years or any other definite period of time does and should permit us to give rise to an arbitrary conclusion, inference or presumption while the adding of a day, week, perhaps a month or more to such a period will arbitrarily permit us to presume another factual inference, conclusion or presumption, despite the fact that an actual examination of the true facts could enable us to arrive at the opposite result?

Can we so conclude that white becomes black solely upon the elapse of such a period of time as we arbitrarily determine is sufficient. This should never be and that absence of a statute making it so we must

conclusively presume that no consideration will then be given to the true facts but that white has become black with a total disregard of what we actually see and know? What reasonable explanation can there be for his continued stay in Mexico after the death of his mother other than that stated by him. It certainly was not economic—it certainly was not the fear of persecution or prosecution; it certainly was not the presence of family problems nor his lack of employment. Nor were there any new or revived ties that held him?

Man is inherently selfish. He desires many times at almost any cost to protect and preserve that which is most dear to him.

Did this act and conduct of appellant remaining then in practically a strange land show consistency with what had gone before him in his life?

Therefore following the pattern of man it is most reasonable and logical to conclude that he could not do that which he desired to do most and above all—to return to all he loved—because of one obstacle—permission could not be obtained for his entry to the United States from the United States Consul. Denial here was final. Further recourse could only be had by repeated requests to this sole authority in a foreign land who had the sole power of saying yes or no.

This was his only avenue of re-entry—there were no other roads nor detours and right or wrong these decisions were final and appellant had no other course but to rely and believe as he did.

In conclusion can we justify separating this aging man from his wife and child as well as the other members of his immediate family and force him to now

return to that country which he freely left in 1916 almost over 50 years ago, to live a lonely life unable to be with them and undoubtedly returning to an economic status and existence far inferior to that which he here has struggled to create even if he is able to obtain such employment at his age.

The forced removal of appellant at his age from the United States to return to a land he has long abandoned leaving behind his family and only remaining close relatives is tantamount to excommunication or life imprisonment. The resulting effect on appellant and the corresponding effect on his family would be shocking, detrimental and continuous. It is indeed a cruel and lasting punishment.

Therefore before this drastic severance is enforced we believe that appellant should be afforded every legal opportunity to explain his conduct by the testimony of himself and others; to have his day in Court so that to this extent American justice will have been done.

Conclusion.

Under the circumstances and as expressed in our Opening Brief, the relief requested should be granted.

Respectfully submitted,

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Attorney for Appellant.

Of Counsel:
NORMAN B. SILVER.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN F. SHEFFIELD

No. 20137

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HENRY GAMERO, also known as ENRIQUE GAMERO,

Appellant,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES DISTRICT; GEORGE K. ROSENBERG, as District Director,

Appellee.

APPELLANT'S OPENING BRIEF.

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TABLE OF AUTHORITIES CITED

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Appellee.

APPELLANT'S OPENING BRIEF.

Introductory Statement.

This is an appeal from the judgment denying Writ of Habeas Corpus upon Appellant's Petition for the same.

Appellant filed his Complaint for Writ of Habeas Corpus alleging that the Appellant is imprisoned, detained and restrained of his liberty by George K. Rosenberg, District Director, Immigration and Naturalization Service, Los Angeles, California, and said imprisonment, detention and restraint are illegal and unlawful.

Appellee alleged a rightful detention of such Appellant by virtue of its order of exclusion based upon its claim that the Appellant was an excludable alien under 212(a)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(a)(2).

Statement of Jurisdiction.

1. The jurisdiction of the District Court herein is believed sustained by and pursuant to Section 106(b) of the Immigration and Nationality Act of 1952 as Amended, 8 U.S.C. 1105(b).

2. Habeas Corpus is available to an alien seeking to test the validity of his exclusion from the United States. *Jones v. Cunningham,* 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285; *Brownell v. We Shung,* 352 U.S. 180, 77 S. Ct. 252, 1 L. Ed. 225;

3. The jurisdiction of the Court of Appeals to review the judgment of the District Court herein is believed to be conferred by Title 28, United States Code, Section 1291.

4. The pleadings necessary to show the existence of the jurisdiction of the District Court herein is believed contained in the Complaint for Writ of Habeas Corpus of Appellant [Tr. of R. p. 29].

Statement of the Case.

Appellant is imprisoned, detained and restrained of his liberty by George K. Rosenberg, District Director, Immigration and Naturalization Service, Los Angeles, California, within the Southern District of California, Central Division.

Appellant, who was born in Durango, Mexico, on September 2, 1909, claims to be a lawful resident of the United States by virtue of the fact that Appellant legally entered the United States for permanent residence in November of 1916 at El Paso, Texas; has ever since and has been and continuously up to the present time claims to have had his lawful domicile and abode in California.

Appellant is married to one Isabel Martel, said marriage having been consummated at Los Angeles, California, on September 21, 1935. Said wife is a legal resident of the United States and there is issue as a result of said union, being one son, Henry, born on October 10, 1938, at Los Angeles, California. Said son is a citizen of the United States.

Appellant has two United States citizen brothers and a lawful resident sister living in the Los Angeles area.

That on or about January of 1932, appellant's mother was admitted to the Los Angeles General Hospital for an illness described as dementia praecox and was discharged therefrom in February of 1932 as a parole patient.

Sometime in 1932, appellant's mother disappeared and her whereabouts were unknown to all the members of her family, including appellant's brothers and sisters and her whereabouts were unknown for more than ten years.

While appellant was employed in the shipyards at Los Angeles, California, living with his wife and was registered with his local Selective Service Board for military service and attending school to improve his skill as a ship yard worker, in the first part of 1943, appellant and his brothers and sisters were notified by an aunt residing in Mexico that she had seen a person who appeared to be the mother of these persons living under lamentable circumstances in an insane asylum under another name.

Thereafter, a conference was held with all of the brothers and sisters, two of whom were in the Armed Forces of the United States at San Diego, California, and it was decided among them to send appellant to

Mexico City to investigate and determine such existence of their mother.

Appellant made preparation for this trip with the intention of remaining a few weeks in Mexico primarily to ascertain if this person were the mother, and, if so, to make arrangements to return her to the United States and for that purpose Appellant obtained permission from the Selective Service Draft Board to be absent from the United States for a period of a few months.

Concurrently, he also obtained a leave of absence from his employment, a leave of absence from his school, and a certification by the Immigration and Naturalization Service of the United States that he would be permitted to return to his lawful residence of the United States.

Prior to his trip to Mexico City, on or about April, 1943, appellant had resided continuously and lawfully in the United States for more than seven years and has so resided ever since November of 1960.

Appellant went to Mexico City voluntarily to search for and locate his mother and not under any Order of Deportation.

Upon his arrival in Mexico City he went to the insane asylum where the person resembling his mother had been seen and found this person to be his mother and in a most deplorable and lamentable condition, barefooted, clothed in dirty overalls, unbathed, with animals crawling in her hair, sleeping in unclean conditions and having to survive on an inadequate diet.

Appellant immediately made plans to try to return his mother to the United States, at which time he com-

municated with the American Consul in Mexico City and was advised that his mother would not be permitted to return to the United States because she was ineligible for immigration visa.

Appellant believes that she was ejected from the United States by the Immigration Service because of her mental condition and that she was in Mexico City because of the action of the Immigration Service of the United States and in that proceeding was unable to defend or represent herself in the United States. She had been a lawful resident of the United States during her entire stay in this country.

Appellant conveyed all of the information concerning his mother to his family in the United States. When appellant was notified by the American Consul that his mother would be refused a visa to return her to her home with her children, he attempted to make a home for her away from the mental institution and continued his fight and efforts to return her to his home in Los Angeles, California, and he continued these efforts until 1953 when his mother died in Mexico City, without her ever being able to return and be with her children in the United States.

Appellant, who was unfamiliar with the Immigration laws of the United States, relied upon the advice of the American Consul in Mexico City that he was also ineligible to return to the United States and that his mother would have been ineligible to return to the United States.

In appellant's efforts to return to his lawful residence in the United States, he applied at San Ysidro for entry and was refused but subsequently was pa-

roled to the United States by the Immigration and Naturalization Service on or about June of 1961 and he has been physically present in Los Angeles, California, with his wife and family ever since said entry.

Thereafter, and on or about October of 1961, appellee instituted exclusion and deportation proceedings against the appellant and ordered the appellant excluded and deported from the United States, because appellant had no visa, passport, I-151 or other entry documents in his possession, as allegedly required under said Section, 8 U.S.C. 1182(a) (20), and was therefore ineligible to receive a visa and should be excluded from admission into the United States.

Thereafter, appellant appealed the Order of the Special Inquiry Officer to the Board of Immigration Appeals, which appeal was subsequently dismissed.

During November of 1963, appellant appealed to the Board of Immigration Appeals for an Order to reopen and reconsider the application for relief under Sections 211(b) and 212(c) of the Immigration and Nationality Act of 1952. Both the Board of Immigration Appeals and the appellee refused to consider appellant's relief under these Sections and refused to permit appellant to present evidence thereunder or permit the appellant to prove he was a returning, lawful resident of the United States, having had his residence in California for more than seven years.

Appellant has offered to produce additional information and evidence to support his contention that his absence from the United States was temporary and was not for the purpose of abandoning his entry and residence in the United States.

Appellant, having exhausted all of the administrative remedies afforded him, filed his Complaint for Writ of Habeas Corpus in the subject District Court after the appellee had initiated action to enforce the exclusion order and deport appellant from the United States.

That no previous Complaint for Writ of Habeas Corpus has been filed by appellant in this court or in any other court involving the subject matter, except that a Petition for Declaratory Judgment was previously dismissed without prejudice in the subject court, Civil No. 63-1538WM.

Appellee threatens and intends to deport appellant from the United States to Mexico as aforesaid and will do so unless restrained by the issuance of a Writ of Habeas Corpus.

During the pendency of the exclusion proceedings and ever since November of 1959, appellant has been at large under a parole order of the Immigration And Naturalization Service, without bond, and has appeared before the immigration authorities whenever called upon to do so.

Upon the hearing on the Return of the Complaint for Writ of Habeas Corpus, the Court denied the Writ upon the papers, documents and records presented to it and failed to permit the appellant to testify concerning the facts as stated by him and to produce other witnesses who would have testified as to his reason for leaving the United States for Mexico and of his intention that such leave was temporary and not with the intention of abandoning his rights to remain a resident of the United States.

Questions Involved.

1. Was the appellant entitled to a full judicial review in the District Court, including the right to testify as well as to produce other witnesses to testify, such witnesses to be called for the purpose of showing appellant's reasons for his leaving the United States and for the length of this stay in Mexico, to refute the inference and determination by the Immigration And Naturalization Service that he thereby intended to abandon and surrender the right to be considered a returning immigrant only temporarily absent from the United States.

2. Was the appellant denied procedural due process of law and a fair hearing when the Special Inquiry Officer denied appellant the right to produce witnesses, including himself, to testify as to the circumstances as represented by him, to prove the reasons for his absence and thereby to rebut the inference the Officer created that he had so intended to and had abandoned his United States domicile and abode.

3. Was there a showing of substantial evidence when the Special Inquiry Officer and the Review Board rested decision solely upon such inference it created without any other evidence, oral or written, to refute appellant's offers of proof.

4. Is the Finding of the District Court(II) [Tr. of R. p. 18] predicated on "substantial evidence" when it and its Conclusion of Law rest only upon the record of the administrative hearings which are based solely on such inference, and was the District Court affording the appellant a fair review without letting appellant and his witnesses be heard to refute such inference standing alone that appellant intended to surrender the right to be considered a returning immigrant only temporarily absent from the United States.

ARGUMENT.

I.

The Appellant Is Entitled to a Hearing on His Complaint for Writ of Habeas Corpus to a Full Judicial Review of the Administrative Proceedings, Which Includes the Right to Present Evidence of Witnesses Including That of Himself and to Be Confronted by Persons Who Would Testify Against Him and the Right to Cross-Examine Such Witnesses.

Conduct is often capable of several interpretations and caution should be exercised in drawing inferences from it. That solely the length of time that a person is absent from a place of residence or domicile, does not of itself create an irrebutable inference or conclusion that he thereby intended to and did thereby establish an abandonment of that residence and domicile.

Today, the alien in every event is now privileged to proceed with court determination for judicial redress on the question as to whether he has been denied a fair hearing and to which he believes himself entitled.

Truly, the fair concept of a fair hearing is a developing one and yesterday's standards may not be acceptable today, and undoubtedly not in the tomorrows.

The Court can conduct an independent, *de novo* inquest to ascertain the facts where it is claimed that unfair procedure took place at the administrative hearing not reflected in the record, and probe such claim of alleged unfairness and is therefore not limited to scrutiny of the administrative record. *Accardi v. Shaughnessy,* 347 U.S. 216, 98 L. Ed. 681, 74 S. Ct. 499.

Under our form of government, judicial review is not stationary, but the rights it affords are ever expanding and thereby justice fulfills its goal by adapting to changing needs and concepts.

While the courts have repeatedly stated that if there had been a fair administrative hearing, the administrative decision is not open to judicial review, some measure of review has been otherwise established by holding that an unreasonable result is equivalent to an unfair hearing.

A single test is furnished by Section 10 of the Administrative Procedure Act for the review of evidence, providing that an administrative finding may be set aside if it is unsupported by substantial evidence on the whole record.

While there is a question as to whether exclusion proceedings come within the Administrative Procedure Act review provisions, as Section 10 does not exempt from its application those situations where "statutes preclude judicial review", it has been decided that despite the statement that the administrative decision is final, this has not precluded judicial review by habeas corpus, and therefore Section 10 seems to apply. No particular form of proceeding is required under Section 10(b) of the Administrative Procedure Act, which provides that any applicable form of legal action is proper (including habeas corpus).

If so, substantial evidence would seem to be required to sustain the administrative order, even though it is tested by habeas corpus.

Section 10 provides:

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved

by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Section(b) "Every agency action may be reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review . . ."

In Brownell, Attorney General, v. Tom We Sung, 352 U.S. 180, 77 S. Ct. 252, 1 L. Ed. 2d 225.

The Court said:

"Admittedly, excluded aliens may test the order of their exclusion by habeas corpus (p. 183)."

At page 185, the court said:

"Furthermore, as we pointed out in *Pedreiro,* such a cutting off of judicial review" would run counter to Section 10 and Section 12 of the Administrative Procedure Act. 349 U.S. 51.

"Exceptions from the . . . Administrative Procedure Act are not likely to be presumed," *Marcello v. Bonds,* 349 U.S. 302, 310 (1955) and unless made by clear language or supersedure, the expanded mode of review granted by that Act cannot be modified. We, therefore, conclude that the finality provision of the 1952 Act in regard to exclusion refers only to administrative finality.

The pertinent sections of the Immigration And Nationality Act, 8 U.S.C. 1182 reads:

"General classes of aliens ineligible to receive visas and excluded from admission: (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(2) Aliens who are insane;

. . .

(20) Except as otherwise specifically provided in this Act, any immigrant who at time for application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to Section 211-(e), [1181(e) of this Title.]"

An alien is entitled to procedural due process of law which means that the hearing must be conducted fairly.

One element of due process is the requirement of a fair hearing. The alien in every event is now privileged to proceed with Court determination for judicial redress on the question as to whether he has been denied a fair hearing and to which he believes himself entitled. Our Supreme Court has made it clear, sometimes only by inference, that exclusion of non-enemy aliens can be accomplished only after they have been accorded procedural due process of law.

More explicitly, the Supreme Court has held that an alien whom it sought to exclude from the United States must be given a fair hearing with a right to establish his right to enter.

That of itself alone, the length of time that a person is absent from a place of residence or domicile, does not create such an inference or conclusion that he thereby intended to and did abandon his residence and domicile.

Relinquishment of domicile, which bears a close relationship to continuity thereof, depends ultimately on the intent of the alien, and since it is a question of fact

for the immigration authorities, the finding on the question of fact will not be reversed in the courts if it is supported by any *substantial evidence.* (Italics ours). *U.S. Illuuzzi v. Curran* (C. A. 2 N.Y.), 11 F. 2d 468.

The decision in *U.S. ex rel. Lindenau v. Watkins* (1947, D.C. N.Y.), 73 F. Supp. 216, is noted for its definition of "substantial evidence": Substantial evidence is of such quality and weight as would be sufficient to justify a reasonable man in drawing the inference of facts which is sought to be sustained. It implies a quality of proof which induces conviction and which makes a definite impression on reason. It must be more than a scintilla of evidence and more than suspicion or surmise. It must be more satisfying than hearsay or rumor. Mere rags and tatters of evidence are not sufficient. Some courts have gone so far as to say that evidence subject to either one of two inferences is not substantial. The test in determining what constitutes substantial evidence in an administrative proceeding is the same as that applied in trials by jury.

Appellant departed voluntarily from the United States not under an Order of Deportation. His reasons for this departure — his reasons for his long stay away — his desire at the time to return his mother to Los Angeles, if proven by his testimony and other witnesses could overcome, if believed, any inference that he so abandoned his United States residence and domicile.

Furthermore, he had a wife who is a lawful resident alien and a son who is a United States citizen by birth. All of his immediate family are citizens and lawful residents of the United States.

All of these factors would tend to prove his true intentions resulting in his voluntary departure and absence from the United States.

It is a far more reasonable rationalization to interpret his conduct by his and others testimony of this then intent surrounded by these material circumstances than to close the mind by concluding that as did the Special Inquiry Officer, that such conduct in absence is capable of only one arbitrary conclusion, being that solely by the length of its duration he could only have intended to abandon his American residence and domicile.

There is no evidence whatsoever which has been produced at any hearing which would show a contrary intention on the part of appellant, but the decision of the administrative hearings depends solely upon such inference based solely on absence of time.

Appellant was not afforded a fair hearing either in the administrative hearings or before the District Court nor was any of their decisions based on "substantial evidence", for their decisions stand naked — without regard or consideration of all of the evidence which could be produced — the other factors and facts that combine to make "intention". Such decisions stand isolated and alone on an erroneous conclusion of both law and fact that a long absence results in but one arbitrary inference (as each of them so determined) — an irrebuttable inference or presumption that the appellant had intended to thereby have abandoned his American residence and domicile.

In fact, the actual decision of the District Court upon which its Conclusions of Law are predicated [Tr. of R. p. 15] states that the Court is warranted in

drawing the inference by such long absence that appellant intended to surrender his right to be considered a returning immigrant only temporarily absent from the United States.

Even under the proceedings and documents standing alone as the evidence in the instant matter, and due consideration of all of them, can it be said that the decisions of the administrative hearings (and therefore in the District Court) are predicated on substantial evidence. Do they not rest solely upon the inference that time alone is the deciding factor and only factor in a determination of the intentions of such absent alien?

In *Shaughnessy v. Pedreiro,* 349 U.S. 481, 99 L. Ed. 868, 75 S. Ct. 591, the Supreme Court stated at pages 51 and 52,

> "The legislative history of both the Administrative Procedure Act and the 1952 Immigration Act supports respondent's right to a *full* judicial review."

A full judicial review can mean only one thing and that is a right to a full hearing not on the examination of the administrative record presented to the District Court on a Writ of Habeas Corpus, but the right to present evidence by witnesses, cross-examination, a full trial covering the issues. There must be an evidentiary hearing in the District Court (unless only a question of law) to determine upon all of the evidence whether the alien was afforded a fair hearing before the administrative agency and is its decision supported by substantial evidence.

In proceedings such as these exclusion matters, it must be kept constantly in mind and ever realized that the

liberty of such alien is at issue — not only his right to live and remain in the United States, but his right, hope, all else, to be allowed to remain with his wife and child, all else that remains of his immediate family now that his mother is deceased which was his then urgent reason for remaining in Mexico.

Again, it must be stressed that at the administrative hearing no evidence was presented by the United States refuting the facts and proof offered of appellant, but reliance was had solely on inference. No evidence, oral testimony, or documentary in nature, was offered by the government which would have refuted and contradicted the contentions of appellant.

Thus we have such inference standing alone to overcome the offers of proof of appellant. It is therefore our contention that an unresolved issue of fact still exists, that the conduct of the appellant is capable of two inferences, and that the District Court should be required to hold a full judicial hearing and determine the truth on the facts and not on the inference alone of absence.

We have assumed that the Judgment of the District Court, on its Findings of Fact and Conclusions of Law intended to reflect Section (a)(20) of 8 U.S.C. 1182, rather than Section (a)(2) thereof for under the latter section no issue was ever created at anytime of the sanity of appellant.

With respect to Section (a)(4) appellant contends and offered to prove that he had no form W-1-151 as none was in existence by regulations of the Immigration Service when the appellant went to Mexico in 1943, and further no passport was required under the cir-

cumstances in this case of appellant because he had a citizen child and his spouse was a resident of the United States (Sec. 2112-8 C.F.R.).

It is also contended that a Judgment based on an erroneous Conclusion of Law such as the section stated is not valid but in view of the fact that appellant would only be entitled to have this case remanded for further proceedings if this Court should so reverse, we believe that such error might be considered as immaterial.

However, we wish to emphasize that the District Court's decision [Tr. of R. p. 15] is likewise predicated solely on a similar inference drawn by it on the bare record (absence of testimony) and no other evidence was considered by the District Court, it also relying upon an inference of long absence as to appellant's intent.

We desire now to re-examine the proof to be offered by the appellant, to which there has been offered by the government no conflicting testimony. The reasons and circumstances of his sudden trip and absence cannot be disputed. His intent in remaining as long as he did will be substantiated by the facts as presented by himself, his witnesses, and documentation. We believe that all of his conduct is capable of only one reasonable conclusion and inference.

Mr. Gamero requests only the opportunity to present evidence in a Court of competent jurisdiction to explain the reasons for his absence from the United States and to present proof that he at all times maintained his residence in the United States from the time of his original entry in 1916 through the difficult years in his life from 1943 to 1953 with his mentally unbalanced mother and continuing until 1961 during which years

he was fighting for his right to return to his domicile in Los Angeles, California and up to the present time.

Mr. Gamero has never been afforded the opportunity of presenting this evidence in any tribunal either in a court of law or before the administrative hearing officer of the Immigration Service.

In 1943, Mr. Gamero was a lawful resident of the United States with his citizen child and lawful resident wife. He had two younger brothers in the Armed Forces of the United States. Imagine the emotional impact when, after 11 years of silence, the family was suddenly informed that their mother had been located in a mental institution in Mexico. At an emergency council of the children, Mr. Gamero was selected as the logical one to travel to Mexico to verify the authenticity of the rumors concerning the existence of their mother. It was logical to select him because he was not in Military Service. He was married with a minor child. He was in a deferred status which rating would not adversely affect the progress of the war. So he went on the emergency trip of mercy.

His intent obviously was to retain his residence and domicile in the United States. The courts have held intent is a fact to be determined from the surrounding circumstances. What did Mr. Gamero do? He took a temporary leave of absence from his employment. He took a temporary leave of absence from his school. He obtained permission from his Draft Board for a temporary absence. He carried with him, his Immigration Identification Card authorizing his return to the United States.

His economic status in the United States as compared with conditions in Mexico obviously was superior. These actions, determined by the surrounding circumstances, emphasize the conclusion that his intent was to return to his abode in Los Angeles as soon as possible.

Imagine the emotional shock when, upon arriving in Mexico, he identified his mother living in the twilight zone of mental disturbance, not recognizing her own son, and the shock of the physical appearance of his mother in the animal condition of her surroundings. He states that he found his mother with dirt encrusted hair and lice, animals crawling on her skin, and required to reside in primitive conditions with unclean bedding in a foul smelling habitation. This, after 11 years of unexplained absence, completely unnerved Mr. Gamero.

His first reaction was to remove her from these nonhygenic surroundings and bathe and clothe her in respectability and dignity because she was his mother.

All of these facts Mr. Gamero offers to prove in a fair hearing to show his residence in the United States and his intention to retain his residence at the time of his departure.

After realizing his first plan of attempting to rehabilitate his mother, he proceeded to inquire of the delegated authority how to effect her return to her family in Los Angeles. This phase of his life begins the long battle on trying to reunite his family. Upon inquiry at the American Consulate, he was told that his mother could not return to the United States because of her mental condition. Mr. Gamero continued his efforts to establish that his mother was in Mexico against her will and probably because of unorthodox action taken by the agencies in the United States. He persisted

in his efforts to obtain authorization for his mother to enter the United States up to the time of her death.

These facts all negate any presumption or inference that there was an intent to abandon residence in the United States.

Mr. Gamero then became confronted with additional obstacles when he was told informally by the Consulate that he could not return to the United States because he had remained in Mexico beyond the period authorized by the authorities. Comprehending the significance of this advice, Mr. Gamero became severely disturbed. He continued his fight to establish the authenticity and legitimacy of his right to return to the United States to his unrelinquished domicile in Los Angeles with his family. He sought to submit evidence explaining the surrounding circumstances of his departure to Mexico to locate his mother and remove her from the mental institution where she was confined. He has never been afforded this opportunity. He seeks the opportunity now through a reopened hearing to establish the foregoing facts and to establish that he is a returning lawful resident of the United States.

The trial judge refers to the absence of Mr. Gamero from the United States as creating an inference that there was an abandonment of his domicile in the United States. If the facts were taken in their entirety, considering the surrounding circumstances at the time of the appellant's departure for Mexico, the only logical inference or conclusion to be drawn from Mr. Gamero's conduct is that his intention was always to return to the United States.

Every fact points to that conclusion. He has a citizen son presently registered with the Military Service. He

has three brothers and sisters with honorable discharges from the Armed Services of the United States. Having come to the United States at seven years of age, he was the product of American education and background, with no economic, social or family ties in Mexico. He had led an exemplary life prior to 1943. His motives in attempting to rescue his mother were exemplary. His conduct in perfecting his return with his mother to the United States was laudable. There is nothing derogatory in any of his activities, either in the United States or in Mexico. In fact, his conduct before and since 1943 has been unimpeachable.

The appellant, Mr. Gamero, pleads for the opportunity to submit evidence to establish that he is now and always has been a resident of the United States since 1916; that he is a returning resident to an unrelinquished domicile in the United States; that it was his intention to retain his residence in Los Angeles when he journeyed to Mexico in 1943 to locate his mother for the purpose of returning her to the family residence in California. When the surrounding circumstances of his departure to Mexico are considered, the only intent that can be reasonably inferred is that he retained his residence and domicile in the United States. Mr. Gamero deserves and we believe he is entitled under the law to the opportunity to present this evidence.

This Court in order to affirm the decision of the District Court and approve the action in the administrative hearing will have to take the position and say that such absence cannot be explained as a matter of law because there arises an irrebuttable presumption of intention to abandon residence and domicile regardless of what such alien could say or prove. We know of no such

statute which creates such a presumption. Furthermore, at what point of time can the Special Inquiry Officer arbitrarily determine you have stayed too long in our sole judgment, and we are not interested in any explanations or reasons as they would make no difference even if true, for we now presume and infer that your particular length of stay is sufficient for us to stamp you with such intention of abandonment of domicile or residence.

To take any other view, the District Court as well as the administrative proceedings must afford such alien a right to be heard and to explain his conduct by testimony of himself and his witness before finally placing the stamp of exclusion upon him. The alien is entitled to this right—the belief or disbelief and weight to any evidence so adduced is for the trier after consideration of all of the evidence from both parties.

Conclusion.

The District Court should have granted a full judicial hearing permitting the appellant to introduce testimony of himself and other witnesses to rebut such arbitrary inference and for the express purpose of ascertaining whether appellant was afforded a fair and full hearing and to determine further, whether the decision of the Special Inquiry Officer is supported by "substantial evidence".

Under these circumstances, and under the law and facts, we believe that the judgment should be reversed with the cause remanded to the District Court in accordance with the views and reasons expressed herein.

Respectfully submitted,

JOHN F. SHEFFIELD,
Attorney for Appellant.

Of Counsel:
NORMAN B. SILVER.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN F. SHEFFIELD,

No. 20136

In the

United States Court of Appeals

For the Ninth Circuit

In the matter of STEWARD GRIFFITH, a married man acting in his separate capacity, bankrupt.

APPELLANTS' BRIEF

Appeal from the United States District Court
for the Western District of Washington, Southern Division
Honorable George H. Boldt, *Judge*

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DAILY JOURNAL OF COMMERCE

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AUTHORITIES

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OTHER AUTHORITIES

JURISDICTION

This is an appeal from three orders entered by the Referee in Bankruptcy and confirmed by the District Court.

Appellant Steward Griffith filed a petition in bankruptcy and was adjudicated bankrupt as a married man acting in his separate capacity in the United States District Court, Western District of Washington, Southern Division, on July 11, 1962.

On July 26, 1963 the Referee entered an order directing Steward Griffith, Merle Griffith, Columbia Acoustics, Inc., Gerald Davis, Rolland Henderson and Anne Buckner to turn over to the Trustee in Bankruptcy the sum of $4,283.40 (R 51). On August 5, 1963 appellants filed their petition for review (R 43) and said order was confirmed by the District Court on March 18, 1965 (R 23).

On October 11, 1963 the Referee in Bankruptcy entered an order adjudging Columbia Acoustics, Inc. to be the alter ego of Steward Griffith Company and an asset of the bankrupt's estate (R 89). On October 21, 1963 appellants filed their petition for review (R 89) and said order was confirmed by the District Court on March 18, 1965 (R 80-A).

On November 29, 1963 the Referee in Bankruptcy entered *ex parte* an order staying Columbia Acoustics,

Inc. from the prosecution of an action for damages fo conversion in the Superior Court of the State of Wash ington in and for the County of Clark entitled "Colum bia Acoustics, Inc., a corporation, vs V. Frank Grove and Patricia Grover, husband and wife" (R 76). Or December 9, 1963 the Referee entered an order (R 74 extending the time to file a petition for review unti Dec. 13, 1963 and on Dec. 12, 1963 Columbia Acoustics Inc. filed its petition for review (R 72). Said order wa confirmed by the District Court on March 18, 1965 (R 69).

The amount involved in each order is more thar $500. On April 13, 1965 Steward Griffith, Merle Grif fith, Columbia Acoustics, Inc., Anne Buckner and Ger ald Davis filed their notice of appeal to the United States Court of Appeals for the Ninth Circuit (R 16).

The District Court had jurisdiction under 11 USC §11(a)(10) as amended. This Court has jurisdiction under 11 USC §47 as amended.

STATEMENT OF THE CASE

On July 10, 1962 Steward Griffith filed a petition in bankruptcy as a married man acting in his separate capacity.

Order of July 26, 1963

On April 3, 1963 the Trustee in Bankruptcy filed a

petition asserting that Gerald Davis, Rolland Henderson, Columbia Acoustics, Inc., Steward Griffith, Merle Griffith and Anne Buckner sold $4,783.40 worth of vinyl belonging to the Trustee and collected the sales price thereof.[1] (R 61)

There was no allegation that any of the property was in possession of the bankrupt at the date of bankruptcy and there are no allegations to support summary jurisdiction. The petition states a claim for conversion, but not for the turnover of any property of the bankrupt.

On April 3, 1963 the Referee in Bankruptcy entered an order directing Steward Griffith and Merle Griffith, Columbia Acoustics, Inc., Rolland Henderson, Gerald Davis and Anne Buckner to show cause why they should not surrender possession of said sum of $4,783.40. (R 59)

The marital community of Steward Griffith and Merle Griffith and Columbia Acoustics, Inc. filed answers asserting that they were adverse claimants and objected to summary jurisdiction (R 55, 57). Further objections to jurisdiction were made at the hearing on April 12 (pp 6, 7, Tr of April 12, 1963). Merle Griffith objected to the jurisdiction of the court for want of personal service (Tr of April 12, 1963, p 2).

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[1] The petition also asserted that Steward Griffith and Merle Griffith had accepted and cashed certain checks in violation of the court's order, but no evidence was offered in regard to such claim and it was abandoned by the Trustee.

Inc. from the prosecution of an action for damages for conversion in the Superior Court of the State of Washington in and for the County of Clark entitled "Columbia Acoustics, Inc., a corporation, vs V. Frank Grover and Patricia Grover, husband and wife" (R 76). On December 9, 1963 the Referee entered an order (R 74) extending the time to file a petition for review until Dec. 13, 1963 and on Dec. 12, 1963 Columbia Acoustics, Inc. filed its petition for review (R 72). Said order was confirmed by the District Court on March 18, 1965 (R 69).

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1. The petition also asserted that Steward Griffith and Merle Griffith had accepted and cashed certain checks in violation of the court's order, but no evidence was offered in regard to such claim and it was abandoned by the Trustee.

At the hearing on April 12, 1963 Anne Buckner testified that Columbia Acoustics, Inc. had sold only $459.90 worth of vinyls obtained from the bankrupt although it had sold other goods purchased from persons other than the bankrupt (Tr of April 12, 1963, p 30). Rolland Henderson testified that 25 to 35 per cent of the cost of vinyl board was attributable to vinyl (Tr of April 12, 1963, p 37) and that some vinyl materials had been obtained from the bankrupt and others had been purchased elsewhere (Tr of April 12, 1963, p 38).

On June 28, 1963 counsel for the Trustee erroneously represented to the court that Anne Buckner had testified that Columbia Acoustics, Inc. had sold $4,783.40 worth of vinyl. (Tr of June 28, 1963, p 1) On page 4 of the transcript of June 28, 1963 counsel for the Trustee misrepresented that the witnesses, Anne Buckner and Rolland Henderson, had testified that they had collected money for the sale of said vinyl. In fact the sales were on credit (Tr of April 12, 1963, p 16).

The Trustee testified that she examined the books of Steward Griffith Company and over objection testified that the total amount of labor expended in manufacturing vinyl was in her opinion at the very most $200 (Tr of June 28, 1963 pp 6, 7). For a reason which is unintelligible to us, counsel for the Trustee stipulated that the claims could be reduced by $300 (Tr of June

28, 1963, p 9) together with a reduction of $200 for said labor cost. The Referee therefore reduced the Trustee's claim by the sum of $500, and on July 26, 1963 entered an order in which he found that "Columbia Acoustics, Inc., Stewart (sic) Griffith and Merle Griffith, Anne Buckner, Gerald Davis, and Rolland Henderson, one or all of them caused to be removed from the assets of the Estate of Stewart (sic) Griffith, Bankrupt, some vinyl and other merchandise and stock in the sum of $4,283.40" and directed that said parties turn over to the Trustee the sum of $4,283.40 "which they received from the sale of these assets of the Trustee." (R 52) Said order contained no finding that any property in possession of the bankrupt was involved and the court made no ruling on the objections to jurisdiction. There was no evidence whatsoever as to the value of any vinyl sold by Columbia Acoustics, Inc. or that any of the respondents, except Columbia Acoustics, Inc. which claimed the vinyl under a sale contract with the bankrupt made before bankruptcy, had received any part of said vinyl or the proceeds therefrom.

On August 5, 1963 Steward Griffith, Merle Griffith, Gerald Davis, Rolland Henderson, Anne Buckner and Columbia Acoustics, Inc. filed their petition for review of the Referee's order dated July 26, 1963. The petition for review was based on the lack of summary jurisdiction in regard to Columbia Acoustics, Inc., the absence

of personal jurisdiction over Gerald Davis, Rolland Henderson and Anne Buckner, the absence of evidence that Steward Griffith and Merle Griffith, Gerald Davis, Rolland Henderson, or Anne Buckner had at any time possession of said property or the proceeds thereof, the absence of evidence that said property had a value of $4,283.40, the absence of evidence that any of said respondents, except Columbia Acoustics, Inc. ever had possession of the property, the failure of the Referee to permit Columbia Acoustics, Inc. and Steward Griffith and Merle Griffith to present evidence, and the admission of opinions by Patricia Grover concerning the material contained in the records of Columbia Acoustics, Inc. (R 43-45).

On September 4, 1963 the Referee filed his Referee's Certificate on Review and Exhibits (R 24-26). On March 18, 1965 the District Court, without opinion, confirmed the Referee's order of July 26, 1963 (R 23).

ORDER OF OCTOBER 11, 1963

On July 26, 1963 the Trustee in Bankruptcy filed an application for an order to show cause why Columbia Acoustics, Inc. should not be declared the alter ego of the bankrupt and of Steward Griffith and Merle Griffith, a marital community (R 102). An order to show cause was issued by the Referee in Bankruptcy on July 29, 1963 which provided for service upon Steward Grif-

fith or Merle Griffith or Ned Hall, their attorney, or Columbia Acoustics, Inc., Rolland Henderson, Gerald Davis and Anne Buckner or Ned Hall, their attorney.

On August 9, 1963 Steward Griffith, Merle Griffith, Columbia Acoustics, Inc., Rolland Henderson, Gerald Davis and Anne Buckner filed their answer asserting that they objected (1) to summary jurisdiction, (2) to jurisdiction on the grounds that no appropriate service of process had been made, and (3) that the petition of the Trustee failed to state a claim upon which relief could be granted. It was affirmatively stated by appellants that Steward Griffith and Merle Griffith had abandoned to the Trustee any claim to amounts due from Columbia Acoustics, Inc. for property sold to it.

Testimony was taken on August 21, 1963 and October 8, 1963. At the outset of the hearing on August 21, 1963 Ned Hall, attorney for appellants, sought to learn what property was involved (Tr of August 21, 1963, p 1). At pages 10 to 13 of said transcript, counsel again inquired what property was involved and noted that the bankrupt had surrendered to the Trustee all of his interest in property sold to Columbia Acoustics, Inc. No claim was made by the Trustee to any property and it appeared that the Trustee already had all of the bankrupt's rights in the property of Columbia Acoustics, Inc. She had in fact seized and sold the property of Columbia

Acoustics, Inc. in December, 1962 (Tr of Oct. 8, 1963, pp 6, 7, 26, 27, 44).

The undisputed evidence was that Gerald Davis, Rolland Henderson, and Anne Buckner owned all of the stock of Columbia Acoustics, Inc., which they purchased with their own money. The evidence was also undisputed that Gerald Davis, Rolland Henderson and Anne Buckner were the only officers and directors of Columbia Acoustics, Inc. They had the right to terminate the employment of Steward Griffith at any time (Tr of August 21, 1963 p 66; Tr of Oct. 8, 1963, pp 2, 3, 25, 26).

The Referee found that Steward Griffith "dominated and managed and owned" Columbia Acoustics, Inc. (R 92), entered into a contract with Columbia Acoustics, Inc. to transfer his property thereto (R 91), and that said transfer left the bankrupt's estate with little or no assets (R 91). The undisputed evidence was that certain property was sold to Columbia Acoustics, Inc. by the bankrupt prior to bankruptcy for a consideration of $50,000. In addition to the sale contract for that property (Exh 16 to Referee's Certificate on Review, R 81-83) which was surrendered to the Trustee, the bankrupt listed assets of the value of $95,503.99 (R 15).

ORDER OF NOVEMBER 29, 1963

On November 29, 1963 the Trustee in Bankruptcy filed her petition with the Referee in Bankruptcy alleging that on April 11, 1963 Columbia Acoustics, Inc. had instituted an action in the Superior Court of the State of Washington in and for the County of Clark against V. Frank Grover and Patricia Grover (who is the Trustee in Bankruptcy) to recover damages for property which defendants had allegedly converted to their own use. The unsworn petition recited that Columbia Acoustics, Inc. had been declared to be the alter ego of Steward Griffith and that the Trustee was acting in accordance with an order entered by the Referee in Bankruptcy. On the same date, without a hearing or notice to any party, the Referee in Bankruptcy entered an order staying said suit.

QUESTIONS PRESENTED

Order of July 26, 1963

1. Was there evidence of the value of vinyl in the amount of $4,283,40?

2. Was there evidence that any of appellants had in their possession on July 26, 1963 the proceeds from the sale of said vinyl?

3. (a) Was there allegation, evidence or finding of fact to support summary jurisdiction?

(b) Will a claim for conversion support summary jurisdiction without consent?

4. Was due process denied Gerald Davis and Anne Buckner by failure to serve them with process or notice?

5. Were Columbia Acoustics, Inc. and Steward Griffith and Merle Griffith denied an opportunity to present evidence?

6. Do the findings fail to support a claim against all appellants because it states that "one or all" of appellants caused property to be converted?

7. Was there any evidence that any appellant received any proceeds from the sale of vinyl?

Order of October 11, 1963

8. Was there any allegation, proof or finding of fact or conclusion of law to support summary jurisdiction concerning the order of October 11, 1963?

9. Was there evidence to support a finding that the bankrupt transferred all assets to Columbia Acoustics, Inc. or that he dominated and owned said corporation and that it was his alter ego?

Order of November 29, 1963

10. Did the Referee have jurisdiction to stay an action *in personam* for damages for conversion by the Trustee and her husband?

11. Was due process denied where the injunction was entered *ex parte?*

SPECIFICATIONS OF ERROR

1. The Court erred in confirming the order of July 26, 1963.

(a) The finding of conversion of vinyl of the value of $4,283.40 was clearly erroneous.

There was no evidence to support the finding.

(b) The order to turn over the sum of $4,283.40 was clearly erroneous.

There was no evidence that any of the appellants had the proceeds of the sale in their possession.

(c) There was no allegation, evidence or finding of fact to support summary jurisdiction and the court did not have summary jurisdiction to try this action for conversion.

(d) Gerald Davis and Anne Buckner were denied due process of law in that no service of process was ever made upon them.

(e) Columbia Acoustics, Inc. and Steward Griffith and Merle Griffith were denied an opportunity to put on evidence.

(f) The findings do not support the order against

any appellant. The findings recite that "one or all" of appellants caused property to be converted.

(g) The order is clearly erroneous in requiring appellants to turn over the sum of $4,283.40 "which they received from the sale of these assets", there being no evidence that any appellant received any sum from the sale of assets.

2. The court erred in confirming the order of October 11, 1963.

(a) The Referee did not have summary jurisdiction.

(b) The findings are clearly erroneous and do not support the order.

(1) There was no evidence to support a finding that the bankrupt transferred all assets to Columbia Acoustics, Inc. or that Steward Griffith dominated and owned Columbia Acoustics, Inc.

(2) There was no allegation, proof or finding of facts showing summary jurisdiction and the court did not have summary jurisdiction. No property in the actual or constructive possession of the bankrupt was involved since the bankrupt had sold the property to Columbia Acoustics, Inc. prior to bankruptcy and in any event at the time of the order the Trustee already had possession

of all of the property of Columbia Acoustics, Inc. and the interest of the bankrupt in the sale contract.

3. The court erred in confirming the order of November 29, 1963.

(a) The Referee has no jurisdiction to stay an action *in personam* for damages for conversion by the Trustee and her husband.

(b) Due process was denied where the injunction was entered *ex parte* without notice or hearing.

SUMMARY OF ARGUMENT

1. There was no evidence of the value of vinyl claimed by the Trustee or that any party received the proceeds from the sale of such vinyl.

2. There was no evidence that any party had possession of the property ordered to be turned over.

3. There was no allegation, evidence, finding or conclusion supporting summary jurisdiction and the court did not have summary jurisdiction to try an alleged claim for conversion.

4. Due process was denied Gerald Davis and Anne Buckner who were never served with any kind of pleading or process.

5. Columbia Acoustics, Inc., Steward Griffith and

Merle Griffith were denied an opportunity to put on evidence.

6. The findings do not support the order of July 26, 1963 because they recite that "one or all" of appellants converted property, but all were held liable.

7. There is no evidence to support the statement in the order that appellants received the sum of $4,283.40 from the sale of vinyl.

8. The Referee did not have summary jurisdiction concerning the order of October 11, 1963.

9. The findings do not support the order of October 11, 1963 and are clearly erroneous. There is no finding of jurisdictional facts and the undisputed evidence was that the bankrupt owned no stock and was not an officer or director of the corporation. There is no evidence or finding that any property in the actual or constructive possession of the bankrupt, at the time of bankruptcy, was involved. The bankrupt had sold the property to Columbia Acoustics, Inc. before bankruptcy but in any event the Trustee had seized the property months before the order and the bankrupt had surrendered his interest in the sale contract, so there was no justiciable controversy presented.

10. The Referee did not have jurisdiction to enter an order staying an *in personam* suit for damages for

conversion and it was a denial of due process to enter the order without notice or hearing.

ARGUMENT

Order of July 26, 1963

1. There was no evidence of the value of vinyl claimed by the Trustee or that any party ever received the proceeds from the sale of said vinyl.

The court found that Columbia Acoustics, Inc., Steward Griffith and Merle Griffith, Anne Buckner, Gerald Davis and Rolland Henderson "one or all of them caused to be removed from the assets of the Estate of Stewart [sic] Griffith, Bankrupt," vinyl and merchandise worth $4,283.40 and converted it to their own use (R 49). The finding is erroneous. There was no evidence that the vinyl had a value of $4283.40 or that any respondent ever received any proceeds from the sale of such property.

The Trustee completely failed to produce any evidence of the value of said vinyl. Anne Buckner testified that the value of all the materials of Steward Griffith Company that Columbia Acoustics, Inc. used during the year 1962 was $459.90 (Tr of April 12, 1963, pp 29-30). She gave no testimony of the value of vinyl purchased from Steward Griffith Company and sold by Columbia Acoustics, Inc. Rolland Henderson testified that the cost

of vinyl in retail sales contracts would be 25 to 35 per cent (Tr of April 12, 1963, p 37). There was no other relevant evidence.

At the commencement of the hearing of June 28, 1963 counsel for the Trustee erroneously represented that Anne Buckner had testified that Columbia Acoustics, Inc. had sold $4,783.40 worth of vinyl and had collected the money. The fact is that she neither testified concerning $4,783.40 worth of vinyl nor that there had been any collection of money from the sale of vinyl. Counsel's statements reported at page 1, Transcript of June 28, 1963, are wholly unsupported by evidence. At page 9, Transcript of June 28, 1963, counsel for the Trustee stated that there should be a deduction of $200 for labor and $300, the reason for which was not explained, and the court then immediately ruled that appellant should turn over to the Trustee the sum of $4,283.40.

All of the evidence is contained in the transcript of April 12, 1963 and the transcript of June 28, 1963. Appellee is challenged to point to any evidence therein that any party received any proceeds from the sale of said property.[2] Appellants know of no evidence that purchasers from Columbia Acoustics, Inc. paid anyone for

2. When a finding is challenged for lack of evidence, appellee is required under paragraph 3 of Rule 18 of this Court to provide record references to the evidence which supports the challenged finding.

said vinyl. The only evidence is that the sale was on credit (Tr of April 12, 1963, p 16).

Following the order of December 4, 1962 (R 63-65) the Trustee in Bankruptcy seized all the assets of Columbia Acoustics, Inc. and sold them in December, 1962 (Tr of Oct. 8, 1963, p 44). At the same time she claimed all of the accounts receivable and notified the account debtors of her claim by a notice typed at the bottom of the statements sent to the account debtors (Tr of Oct. 8, 1963, pp 45, 46). To permit this order to stand would be to allow the Trustee to have a double recovery by obtaining the accounts receivable for the sale of said vinyl and to have judgment against appellants who never received the proceeds of the sale.

2. There was no evidence that appellants had in their possession any property to turn over. An order to turn over property is appropriate only when there is evidence that the defendant has the property at the time of the proceeding. In *Maggio v. Zeitz*, 333 US 56, 92 L Ed 476 (1948), the court said concerning a turn over order:

> "The nature and derivation of the remedy make clear that it is appropriate only when the evidence satisfactorily establishes the existence of the property or its proceeds, and possession thereof by the defendant at the time of the proceeding. * * *" 92 L Ed 484

3. The court did not have summary jurisdiction. The burden of alleging and proving summary jurisdiction is on the Trustee. *First National Bank of Negaunee v Fox*, 111 F2d 810, (CCA 6, 1940); *City of Long Beach v Metcalf*, 103 F2d 483, (CCA 9, 1939).

The Trustee's petition asserts no grounds for summary jurisdiction (R 61-62). She asserts that appellants sold property of the Trustee and "collected the money". If the petition asserts a claim, it is one for conversion, which cannot be tried by the Referee without consent. *Suhl v Bumb*, 348 F2d 869 (CCA 9, 1965)

Appellants objected to summary jurisdiction (R 55, 57). The Trustee produced no evidence to support summary jurisdiction and the Referee failed to make any finding or ruling on the objection to summary jurisdiction (R 48-49). In his Certificate on Review the Referee recites that the court had summary jurisdiction by reason of an order of December 4, 1962 (which appears in the record at pages 63 to 65). None of the parties other than the bankrupt were before the court at the hearing in connection with said order of December 4, 1962. But in any event said order contains nothing which supports summary jurisdiction. This property is in no way mentioned in that order.

Columbia Acoustics, Inc. asserted a bona fide adverse claim of right to said property by reason of having

purchased the property from the bankrupt on a conditional sale contract for $50,000 prior to bankruptcy. Its answer asserts that it had possession and held its accounts receivable adversely to the Trustee (R 53). No attempt was made by the Trustee to show any facts to the contrary.

In this case the Trustee seeks a recovery for conversion. The property is said to have been sold and the proceeds therefrom applied to appellants' own use. This Court has recently held that tortious conversion of funds does not provide a basis for summary jurisdiction. In *Suhl v Bumb,* 348 F2d 869, (CCA 9, 1965), this Court said:

> "* * * In the absence of property of the debtor in the actual or constructive possession of the court, no basis for summary jurisdiction is provided. A tortious conversion of funds, as alleged here, can only be established in a plenary suit. A summary proceeding cannot establish the fact of the conversion and in that manner justify the treatment of the converter's assets as part of the bankrupt's estate, and, in turn, justify the court's administration of the converter's assets. To sustain such an approach would result in a sacrifice of one's right to a full dress trial to refute allegations of tortious behavior." 348 F2d 874.

4. Gerald Davis and Anne Buckner were denied due process of law.

No process of any kind was served upon Gerald

Davis, Rolland Henderson or Anne Buckner. They made no appearance except that Rolland Henderson and Anne Buckner appeared as witnesses for the Trustee. The order to show cause provided that service could be made upon Rolland Henderson, Gerald Davis, Anne Buckner or Ned Hall, their attorney. A service was made upon Ned Hall but he was not the attorney for said individuals at that time. The service was insufficient and these parties were never brought before the court.

5. Columbia Acoustics, Inc. and Steward Griffith and Merle Griffith were denied an opportunity to put on evidence.

Ned Hall represented Columbia Acoustics, Inc. and Steward Griffith and Merle Griffith. At the conclusion of his cross-examination of the Trustee, the court inquired "Do you have anything further?" and Mr. Hall replied "I have nothing further", referring to the cross-examination (Tr of June 28, 1963, p 9). The court then announced its decision on the merits. At the hearing on July 26, 1963 Columbia Acoustics, Inc. and Steward Griffith and Merle Griffith moved to reopen the hearing to put on evidence (Tr of July 26, 1963, pp 1-10). The motion was denied (Tr of July 26, 1963, p 10). Columbia Acoustics, Inc. and Steward Griffith and Merle Griffith never had an opportunity to present evidence and were thereby denied due process of law.

6. The findings do not support the order of the Referee but in any event are clearly erroneous. The court found that "Columbia Acoustic, Inc., Stewart [sic] Griffith and Merle Griffith, Anne Buckner, Gerald Davis, and Rolland Henderson, one or all of them caused to be removed from the assets of the Estate of Stewart [sic] Griffith, Bankrupt, some vinyl and other merchandise and stock in the sum of $4,283.40 and converted it to their own use" (R 49).

If *one of them* caused property to be converted, as the court found, the others would of course not be liable. But there was no evidence that any party had caused assets to be removed from the estate of the bankrupt. The evidence showed that Columbia Acoustics, Inc. bought the property prior to bankruptcy (Exh 16). It always agreed that it owed the bankrupt's estate for the purchase of said property. There was no claim and no evidence that the sale price was inadequate or that the sale was in any way other than a valid sale for a fair consideration completed prior to bankruptcy.

The order provided that Steward Griffith, Merle Griffith, Columbia Acoustics, Inc., Gerald Davis, Rolland Henderson and Anne Buckner "turn over to the Trustee the sum of $4,283.40 which they received from the sale of these assets of the Trustee." (R 49) The statement that they received that amount from the sale of the

assets is clearly erroneous. There is absolutely no evidence in support thereof.

There is no finding to support the Trustee's claim of summary jurisdiction. The court made no finding on the assertion of Columbia Acoustics, Inc. that it held the property under bona fide adverse claim of right. The trustee had the burden "of both alleging and proving facts supporting the jurisdiction." *First National Bank of Negaunee v. Fox*, 111 F2d 810, 813 (CCA 6, 1940) and the Referee's certificate was defective where "It did not contain any findings of the jurisdictional facts nor conclusions of law." *Kelso v. Maclaren*, 122 F2d 867, 869 (CCA 8, 1941).

The Order of October 11, 1963

1. The Referee did not have summary jurisdiction.

There were no allegations in the Trustee's petition (R 102) showing any basis for summary jurisdiction. Objection was duly made by appellants to the court's summary jurisdiction (R 96). The evidence showed that prior to bankruptcy the bankrupt transferred certain property to Columbia Acoustics, Inc. by a conditional sale contract for a consideration of $50,000 (Exh 16 to Referee's Certificate on Review, R 83). There was no finding of any property in the actual or constructive possession of the bankrupt at the time of bankruptcy, but on the contrary the court found that the bankrupt

had transferred property to Columbia Acoustics, Inc. prior to bankruptcy "by mortgages and contract" (R 91). The finding was that there had been a fraudulent transfer[3] although there had been no allegation and no evidence that the consideration of $50,000 was less than a fair consideration. The fact was that all of the property of Columbia Acoustics, Inc. had been seized by the Trustee (Tr of Oct. 8, 1963, pp 6, 7, 26, 27) and admittedly sold by her in December, 1962 (Tr of Oct. 8, 1963, p 44). As a result there was no property involved which was in the actual or constructive possession of the bankrupt at the time of bankruptcy. There was simply no property at all involved in the proceeding. Summary jurisdiction does not permit declaratory judgments but in any event no justiciable controversy was presnteed.

The court made no findings on appellants' objection to summary jurisdiction (R 90-92) but attempted to correct the defect by asserting in the Certificate on Review that the court had summary jurisdiction "for the reason that all the assets of COLUMBIA ACOUSTICS, INC. are the property of this estate under order dated December 4, 1962" (R 82).

The order of December 4, 1962 (R 63) does not assert that the assets of Columbia Acoustics, Inc. are the prop-

3. The finding was: "That Steward Griffith found himself in financial difficulties and for the purpose of secreting his property and transferring his property to avoid his creditors, he entered into an alleged contract transferring all or substantially all of his property by mortgages and contract of his assets of the Steward Griffith Company to Columbia Acoustics, Inc., thereby leaving this bankrupt estate with little or no assets." (R 91)

erty of the bankrupt's estate. But no appellant other than the bankrupt was involved in the Bankruptcy Court on December 4, 1962 and if pertinent the order would not affect the other appellants. In any event the Trustee had already seized all of the property of Columbia Acoustics, Inc. (Tr of October 8, 1963 pp 6, 7, 26, 27, 44) and the proceeding could not have involved such property.

The Trustee had the burden of establishing summary jurisdiction (*First National Bank of Negaunee v. Fox*, 111 F2d 810 (CCA 6, 1940); *City of Long Beach v. Metcalf*, 103 F2d 483, 487 (CCA 9, 1939)) and failed to do so.

2. The findings are clearly erroneous; they do not support the order.

(a) The court found (R 91) that the bankrupt transferred substantially all of his property to Columbia Acoustics, Inc. thereby leaving his estate with little or no assets. The evidence does not support the finding. The fact is that the sale to Columbia Acoustics, Inc. was for a consideration of $50,000 (Exh 16 to Referee's Certificate, R 83) and the bankrupt's interest in the contract was turned over to the Trustee (R 97). The bankrupt listed additional assets in his schedules of the value of $95,503.99 (R 15).

(b) The court found that the corporation was

"dominated and managed and owned by Steward Griffith" (R 92). The finding is unsupported by evidence. The evidence was that the stock was owned by others and the court so found (R 91). Steward Griffith was not an officer or director; his services were terminable at any time by the officers and directors who were also the stockholders (Tr of Aug. 21, 1963 p. 66, Tr of Oct. 8, 1963, pp 2, 3, 25, 26).

(c) The court failed to make any finding of a jurisdictional fact which would support summary jurisdiction. The findings are thus insufficient to support the order.

(d) Columbia Acoustics, Inc. was not shown to be the alter ego of the bankrupt since the evidence was undisputed that Rolland Henderson, Gerald Davis and Anne Buckner purchased the stock of Columbia Acoustics, Inc. with their own funds, that they alone were the officers and directors and Steward Griffith was merely an employee whose services were terminable at any time (Tr of Aug. 21, 1963, p 66, Tr of Oct. 8, 1963, pp 2, 3, 25, 26). This was not a case of a transfer without consideration to a corporation owned by the bankrupt. The transfer was for a valid consideration, which has not been attacked, to an entity owned independently by others. The corporation used some items purchased from the bankrupt, but also purchased other

property—it did not operate merely with property acquired from the bankrupt (Tr of April 12, 1963, pp 30, 38). Previous to the hearing the Trustee had obtained possession of all the property of Columbia Acoustics, Inc. (Tr of Oct. 8, 1963, pp 6, 7, 26, 27, 44) and it was manifestly not operating as the alter ego of the bankrupt or at all.

The Order of November 29, 1963

The court on November 29, 1963 (R 76) entered an order *ex parte* restraining Columbia Acoustics, Inc. from continuing an action begun April 11, 1963 by Columbia Acoustics, Inc. (R 78). The action was for an alleged conversion by V. Frank Grover and Patricia Grover, who is the Trustee herein.

1. Where *in rem* proceedings in non-bankruptcy courts interfere with the Bankruptcy Court's custody of the assets of the estate, they may be enjoined. 1 Collier on Bankruptcy (14th Ed) 304.

> "* * * On the other hand, *in personam* suits against bankruptcy receivers or trustees, as for conversion, do not interfere with the *res* in the bankruptcy court's possession and consequently cannot be enjoined. * * * " 1 Collier on Bankruptcy (14th Ed) 305

There is no showing here that the suit threatened any interference with the assets of the estate. The suit

was merely an action for damages for conversion. In *Hilding v. Guarantee Bond & Mortgage Co.*, 18 F2d 792 (W D Mich 1927), it was held that a federal court could not enjoin an action for conversion against a trustee in bankruptcy pending in a state court. The same result was reached, for the same reason, by the Seventh Circuit in a libel action against trustees of the debtor in a proceeding under Section 77 of the Bankruptcy Act. In *Re 4145 Broadway Hotel Co.*, 124 F2d 891 (CCA 7, 1941).

2. Appellant Columbia Acoustics, Inc. was denied any opportunity to be heard on said order which was entered *ex parte*. Due process was clearly denied.

CONCLUSION

For the reasons stated, the orders of the District Court should be reversed.

Respectfully submitted

McCOLLOCH, DEZENDORF & SPEARS

HERBERT H. ANDERSON

STANLEY R. LOEB

NED HALL

APPENDIX A

EXHIBITS

A. ORDER OF JULY 26, 1963

Exhibit No.	*Identified*	*Offered*	*Received*
4	No	No	No

B. ORDER OF OCTOBER 11, 1963*

Exhibit No.	*Identified*	*Offered*	*Received*	*Refused*
1*	21	21	21	
2*	25	26	26	
3*	25	26	26	
4*	31	33	34	
5*	44	No	No	
6*	53		56	
7*	57	59		59
8*	78	82	84	
9*	88	89	90	
10*	90	92	92	
11*	106	107	109	
12*	110		112	
13**	33	33	33	
14**	35	36	36	
15**	39	39	40	
16**	68	69	69	

* References are to pages of August 21, 1963 Transcript of testimony.

** References are to pages of October 8, 1963 Transcript of testimony.

CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

Attorney

No. 20135

In the

United States Court of Appeals

For the Ninth Circuit

STEWARD GRIFFITH, MERLE GRIFFITH, COLUMBIA ACOUSTICS, INC., ANNE BUCKNER and GERALD DAVIS,

Appellants,

vs.

PATRICIA GROVER, Trustee of the Estate of Steward Griffith, Bankrupt,

Appellee.

APPELLANTS' BRIEF

Appeal from the United States District Court for the Western District of Washington, Southern Division

Honorable George H. Boldt, *Judge*

NED HALL
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DAILY JOURNAL OF COMMERCE
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JURISDICTION

This is an action to set aside an alleged fraudulent transfer. It was filed in the United States District Court for the Western District of Washington, Southern Division. Plaintiff is Patricia Grover, Trustee in Bankruptcy of the Estate of Steward Griffith, a married man acting in his separate capacity. Defendants-Appellants are Steward Griffith and Merle Griffith, husband and wife, in their separate capacities and as a marital community, Anne Buckner, Gerald Davis, and Columbia Acoustics, Inc., a Washington corporation. Defendant Rolland Henderson has not appealed. The matter in controversy exceeds $10,000 exclusive of interest and costs (R 6).

After a trial to the court the trial court entered findings and conclusions (R 59) and judgment (R 88) on March 18, 1965 in favor of plaintiff and against defendants and each of them for the sum of $42,259.89. On April 13, 1965 all defendants except Rolland Henderson appealed from the judgment (R 90).

The District Court had jurisdiction of this case under 11 USC § 107 as amended and 28 USC § 1331 as amended. This Court has jurisdiction under 28 USC § 1291 as amended.

STATEMENT OF THE CASE

This action was brought under Section 67d, (11 USC § 107(d)) (R 2)and 70e, (11 USC 110(e)) (R 4)

of the Bankruptcy Act by plaintiff Patricia Grover, Trustee in Bankruptcy of the Estate of Steward Griffith, a married man, acting in his separate capacity, bankrupt, against defendants, Steward Griffith and Merle Griffith, husband and wife, and the marital community, Gerald Davis, Rolland Henderson, Anne Buckner and Columbia Acoustics, Inc. to recover an alleged fraudulent transfer of the property of the bankrupt.

The bankrupt, Steward Griffith, and his wife were bona fide residents of Washington domiciled at Vancouver, Washington (R 20), and the property involved was found by the court to be community property (Tr 101). The date of bankruptcy is July 11, 1962 (R 21).

The transaction involved was the deposit by Steward Griffith and Merle Griffith, husband and wife, on May 8, 1962 in a bank in Vancouver, Washington, of $42,-259.89 of funds of the marital community withdrawn from another bank in Vancouver, Washington (R 21). From this deposit moneys were loaned to the bankrupt. He used such moneys for payroll and other payments to creditors (R 21, Tr 38), and there remained on deposit at the date of bankruptcy the sum of $8,-057.23 (Exh 3).

Plaintiff sought recovery from all defendants on the theory that they had conspired, aided and abetted the defrauding of the bankrupt's creditors (R 25).

The court entered judgment against defendants Steward Griffith and Merle Griffith, and the marital community, and Gerald Davis, Rolland Henderson, Anne Buckner and Columbia Acoustics, Inc. for the sum of $42,259.89, costs and disbursements (R 88).

STATEMENT OF FACTS

Defendants Steward Griffith and Merle Griffith were and are husband and wife. They were bona fide residents of the State of Washington domiciled at Vancouver, Washington, since December 14, 1958 (R 20). Steward Griffith operated a business in Portland, Oregon, as a sole trader (R 20) under the trade name of "Steward Griffith Company" until his petition in bankruptcy was filed (R 60).

The court found that the assets of Steward Griffith's Portland business are community property (Tr 101). It was stipulated (R 21) and the court found that the debts of the business are separate liabilities (Tr 101). In December 1961 Steward Griffith and his wife began depositing some of the community property in the Seattle First National Bank, Clark County Branch, Vancouver, Washington, in an account with an assumed name of S & M Enterprises (R 21). S & M represent the first letter of the given names of Steward and Merle Griffith (R 21). Community living expenses were paid from this account (R 21) and loans from these com-

munity funds were made to Steward Griffith Company for payroll and other expenses (R 21).

On May 8, 1962, the marital community caused $42,259.89 to be transferred from the S & M Enterprises account in the Seattle First National Bank in Vancouver to an account under the name of M. M. Knowles (Merle Griffith's maiden name) in the First Independent Bank in Vancouver, Washington. (R 21) A part of these funds was advanced to the bankrupt and by him paid to his creditors (R 21, Tr 38), and at the date of bankruptcy the sum of $8,057.23 (Exh 3) remained in the M. M. Knowles account and the sum of $10,743.72 remained in the S & M Enterprises account (Exh 1).

On July 11, 1962 Steward Griffith filed a petition in bankruptcy in the United States District Court for the Western District of Washington and was adjudicated a bankrupt as a married man acting in his separate capacity (R 21). Neither Merle Griffith nor the marital community is in bankruptcy.

Plaintiff Patricia Grover is the Trustee in Bankruptcy of the Estate of Steward Griffith, a married man acting in his separate capacity (R 21). It was stipulated that all of the creditors in the bankruptcy are separate creditors of Steward Griffith and their claims are limited to his separate property (R 21).

No evidence was produced on the solvency of either

Steward Griffith or Merle Griffith in December 1961. Merle Griffith's solvency or insolvency was of course immaterial, but the court found, without any supporting evidence, that during December 1961 "Steward Griffith and Merle Griffith became insolvent" (R 60-61). At the trial the court erroneously advised Steward Griffith that one is deemed insolvent when "unable to meet its obligations in the ordinary course of business" (Tr 70), rather than "when the present fair salable value of his property is less than the amount required to pay his debts" as provided in Sec 67d(1)(d) of the Bankruptcy Act, 11 USC Sec 107(d)(1)(d), or "when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on existing debts as they become absolute and matured" as provided in RCW 19.40.020. After the court's erroneous instruction on insolvency, Mr. Griffith testified that the Steward Griffith Company was not insolvent in December 1961 (Tr 70). There is no other evidence relating to the bankrupt's insolvency. There was no evidence concerning the fair salable value of his property or of his debts in December 1961 or at any other time. No attempt was made to introduce evidence of the bankrupt's insolvency on May 8, 1962, the date of the challenged bank deposit, or as of any other date.

There was no finding that defendants Gerald Davis, Rolland Henderson, Anne Buckner and Columbia Acous-

tics, Inc. had conspired with, aided or abetted the bankrupt in defrauding his creditors. The court expressly stated:

> "Well, I do not find that any parties other than the bankrupt and wife were guilty of conduct amounting to fraud, and not any one of the other parties Defendant will be held chargeable with fraud." (Tr 105-6)

QUESTIONS PRESENTED

1. Does state law determine the interests of husband and wife in property acquired after marriage?

2. Are the interests of husband and wife in personal property acquired during marriage governed by the law of their domicile?

3. Is the community property here involved subject to the claims of separate creditors of the bankrupt?

4. Was there any evidence of a transfer?

5. Are the findings supported by the evidence?

6. Do the findings support the judgment?

SPECIFICATIONS OF ERROR

1. The court erred in failing to apply the law of Washington to determine the interests of husband and wife in property acquired after marriage, and in failing to hold that the property which it found to be com-

munity property was not subject to the claims of separate creditors of the bankrupt.

The state law of the parties' domicile governs the nature of interests of husband and wife in personal property acquired during marriage. The bankrupt and his wife were domiciled in Washington and under Washington law the property here involved was community property and not subject to the claims of separate creditors of the bankrupt.

2. The court erred

(a) in entering Finding VIII (R 60-61) to the effect that Steward Griffith and Merle Griffith in December, 1961, began depositing substantially all of their assets and funds with banks in Vancouver, Washington; that during December, 1961, Steward Griffith and Merle Griffith became insolvent and that prior to December, 1961, Steward Griffith and Merle Griffith transacted all of their business and financial business with banking institutions located in Portland, Oregon;

(b) In entering Finding IX (R 61) to the effect that Steward Griffith and Merle Griffith formed Columbia Acoustics, Inc. for the purpose of avoiding their creditors and that defendants Rolland Henderson, Gerald Davis and Anne Buckner participated in the formation and operation of Columbia Acoustics, Inc. for their personal benefit;

(c) In entering Finding X (R 61) to the effect that the activities of Steward Griffith and Merle Griffith in depositing funds in Washington were done with intent to frustrate the claims of their Oregon business creditors;

(d) In entering Finding XI (R 61) to the effect that said business claims and liabilities of Steward Griffith and Merle Griffith were incurred for the benefit of Steward Griffith and Merle Griffith and that the assets deposited by Steward Griffith and Merle Griffith are subject to the claims of creditors arising out of the Oregon business;

(e) In entering Finding XII (R 62) to the effect that the deposit and/or transfers of assets of Steward Griffith Company was a deliberate fraud perpetrated by Steward Griffith and Merle Griffith upon their Oregon business creditors ;

(f) In entering Finding V (R 60) to the effect that both Steward Griffith and Merle Griffith knew the nature and extent of the Oregon business and received substantially all of their income therefrom.

There is no evidence to support said findings; said findings relate to actions, assets, liabilities and creditors of the marital community of Steward Griffith and Merle Griffith and are therefore immaterial and irrelevant to this case which involves claims of separate creditors of Steward Griffith.

3. The evidence and findings do not support the judgment.

(a) Findings V, VIII, IX, X, XI and XII relate to actions taken by the marital community and the assets and liabilities of the marital community. They are irrelevant. There is no evidence or findings relating to the actions of the bankrupt, his separate estate or his separate creditors.

(b) There is no evidence or finding that Gerald Davis, Anne Buckner or Columbia Acoustics, Inc. conspired with, aided or abetted the bankrupt in connection with the alleged fraudulent transfer, and the court expressly found that said parties were not guilty of fraud (Tr 105-106).

(c) There is no evidence or finding that any creditor had a provable claim in bankruptcy or that any creditor with a provable claim was defrauded.

SUMMARY OF ARGUMENT

1. State law determines the interests of husband and wife in property acquired after marriage.

2. The interests of husband and wife in personal property acquired during marriage are governed by the law of their domicile.

3. The property here involved was community property and not subject to the claims of separate creditors of the bankrupt.

4. There was no evidence of a transfer; the deposit of money in the bank constitutes neither a transfer nor a fraud.

5. The findings are not supported by the evidence. They are clearly erroneous.

6. The findings do not support the judgment.

ARGUMENT

1. State law determines the interests of husband and wife in property acquired after marriage.

There was no fraudulent transfer if the property would not have passed to the trustee in bankruptcy. Whether this property would have passed to the trustee in bankruptcy is governed by Sec. 70a(5) of the Bankruptcy Act, 11 USC § 110a(5), which vests in the trustee title to property which the bankrupt could have transferred or which might have been levied upon under judicial process against him.

Except where the property is controlled by a federal statute[1] " 'Whether property could have been transferred by a bankrupt prior to the filing of the petition or was then subject to levy and sale under judicial process

1. For example: Homestead entry under federal law, desert entry, Indian rights, claim against federal government. See Authorities therefore in f.n. 22, 4 Collier on Bankruptcy p 1034.

against him is generally a matter of local law' [citations omitted]" 4 Collier on Bankruptcy, p 1034, f.n. 22.

All present law is to the effect that state law determines the bankrupt's interest in community property. At 4 Collier on Bankruptcy (14th Ed) 1065 the following appears:

> "In connection with the trustee's assertion of title to the bankrupt's interest in a tenancy by the entirety, tenancy in common, joint tenancy or community property, it is again necessary to emphasize that applicable state law determines the nature, extent and effect of these relationships. The general problem then is whether under the pertinent local law the bankrupt's interest in a tenancy by the entirety, community property or the like, could by any means have been transferred or levied upon or seized at the time the petition was filed. * * *"

Neither the Bankruptcy Act nor any other federal statute bears upon whether the bankrupt could have transferred an interest in community property or whether it is subject to levy under judicial process.

> "Appropriate state law has been applied to the following matters: * * * what assets of the judgment debtor may be reached by execution; * * *" 7 Moore's Federal Practice (2d Ed) 2418

The Federal Courts have consistently held that whether property could have been transferred or sub-

jected to levy, as described in Section 70a(5) of the Bankruptcy Act, 11 USC § 110(a)5 is a question of state law. *In Re Furness*, 75 F2d 965 (CCA 2, 1935), the court said at page 966:

> "Whether property could have been transferred by a bankrupt prior to the filing of the petition or was then subject to levy and sale under judicial process against him is generally a matter of local law. * * *"

In *Re Kearns*, 8 F2d 437 (CCA 4, 1925), the court said at page 437:

> "It may be conceded in this case that the title of the trustee in bankruptcy, whatever it may be, takes effect only as of the date of the adjudication in bankruptcy (section 70a, subsec. 5, Bankruptcy Act [Comp. St. § 9654]), and that the ascertainment of just what the estate is, and how the same may be reached by creditors, if at all, is to be determined largely by the state law on the subject. Hence, if an estate by entireties under North Carolina law cannot be subjected to the payment of debts of either tenant during the period of their joint lives, this court would, in administering the bankruptcy law, follow and adopt the construction and interpretation placed by the state upon its own Constitution and laws, as the rule of property within the state."

In *Re Brown*, 60 F2d 269 (DC WD Ky 1932), the bankrupt contended that certain property did not pass to the trustee in bankruptcy. In that case the court held

that the property involved did pass to the trustee in bankruptcy but Judge Dawson said at page 272:

> "While I am firmly convinced that the rule here announced is a correct construction of the statutes which have been referred to, yet if by a settled line of decisions the Kentucky Court of Appeals had construed these statutes differently in the situation here presented, I would be compelled to follow that line of decisions; * * *"

In *Adelman v Centaur Corporation*, 145 F2d 573, (CCA 6, 1944), the court said at page 575:

> "The test to be applied under Section 70 of the Bankruptcy Act as to what property passes to a trustee in bankruptcy is whether, at the date of the filing of the petition the property could have been (1) transferred by the bankrupt or (2) levied upon and sold under judicial process against him or otherwise seized, impounded or sequestered. It is clear from the language of the Act that property or property rights of the bankrupt which at the date of bankruptcy are not in any manner transferable by him or leviable at law or subject to sequestration in a proceeding against the bankrupt do not pass to the trustee. The effectiveness of a transfer or an assignment as against the trustee, is to be tested by the standards of applicable state law. * * *"

Collier on Bankruptcy (14th Ed) states unequivocally that the nature of community property is governed by state law. The following appears at 4 Collier on Bankruptcy (14th Ed) 1076:

"* * * The community estate springs entirely from statutory sources, and its nature and extent depend wholly upon the applicable state law. * * *"

The District Court erroneously believed it was free to disregard the state law of property rights because it has been held that the bankruptcy court is not bound by state law on matters covered by federal staute. The District Court relied upon *Local Loan Co v Hunt*, 292 US 234, 78 L Ed 1230, 54 S Ct 695 (1934) (Tr 100-101, R 85), and *Vanston Bondholders Protective Committee v Green*, 329 US 156, 91 L Ed 162, 67 S Ct 237 (1946) (R 86), both of which dealt with an application of a specific federal statute. *Local Loan Co.* involved a determination of the scope of the discharge provisions of Section 17 of the Bankruptcy Act. 11 USC 35 *Vanston Bondholders Protective Committee* dealt with the question of allowability of a claim under Section 63 of the Bankruptcy Act, 11 USC 103.

State law was not controlling in those two cases because there the court was construing the effect of the federal statutes. That is not our case and those cases do not hold or provide the slightest suggestion that a federal court may apply its notion of equitable principles to matters which are governed solely by local law. Here there is no governing federal statute as there was in *Local Loan Co.* and *Vanston Bondholders Protective*

Committee, and the only law which could be applied is state law.

2. The interests of husband and wife in personal property acquired during marriage are governed by the law of their domicile.

Snyder v Stringer, 116 Wash 131, 198 Pac 733 (1921), follows the usual rule that "The law of the domicile controls as to personal property acquired during coverture." There Snyder and his wife were domiciled in Washington. Snyder had a business in Montana and Iowa. He purchased an automobile in Iowa with funds earned by him in his business in Iowa and Montana. The automobile was brought to Washington where it was seized to satisfy a judgment against Snyder on a separate obligation for which the community was not liable.

In support of the seizure it was argued that under the laws of Montana and Iowa the earnings of a husband became his separate property and liable to levy and sale in satisfaction of his individual debts. In holding the automobile not available for satisfaction of the separate debt, the Washington court pointed out that the laws of Montana and Iowa were inapplicable because the situs of personal property is deemed that of the domicile of the owner. The court said:

"We are of the opinion that, for the purpose of

> "* * * The community estate springs entirely from statutory sources, and its nature and extent depend wholly upon the applicable state law. * * *"

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"We are of the opinion that, for the purpose of

> determining by the courts of this state the ownership of this automobile, that is, as to whether it is community or separate property, both spouses being domiciled in this state when the automobile was acquired in the manner we have noticed, the situs of the property, to wit, the automobile, must be deemed to be that of the domicile of respondents, whatever may be said as to its situs for the purpose of determining its liability to seizure and sale, to satisfy the individual debts of respondent Snyder, while it was in Montana or Iowa, by the courts of those states." 198 Pac 734

The Restatement of the Law of Conflicts of Laws provides in Section 290:

> "Interests of one spouse in movables acquired by the other during the marriage are determined by the law of the domicile of the parties when the movables are acquired."

To the same effect see McKay on Community Property, pp 431-432.

Nothing unusual is presented by the requirement that the court look to the law of a party's domicile to discover the extent of his interests in personal property. The Bankruptcy Act itself commands that the courts give effect to the exemptions allowed the bankrupt by the law of his domiciliary state, Section 6, Bankruptcy Act; 11 USC § 24, although his bankruptcy might be

pending in another state where he had his principal place of business, Sec 2 Bankruptcy Act; 11 USC § 11.

There is so far as we have been able to determine no exception anywhere to the rule that the interests of husband and wife in personal property are governed by the law of the domicile. This Court in *United States v Elfer*, 246 F2d 941, 944 (CA 9, 1957) said:

> "As a general rule marital interests in personalty acquired during marriage are governed by the law of the domicile of the parties at the time of acquisition. Snyder v. Stringer, 1921, 116 Wash. 131, 198 P. 733; * * *" 246 F2d 944

3. The property here involved was community property and not subject to the claims of separate creditors of the bankrupt.

It is stipulated that the creditors involved are the separate creditors of Steward Griffith and that their claims are limited to his separate estate (R 21).

In Washington

> "All property acquired by either of the spouses during coverture is presumptively community property, and the burden is upon the party who contends that it is separate property to prove otherwise." *Rustad v Rustad*, 61 Wn2d 176, 377 P2d 414, 415 (1963)

No evidence was presented to overcome the presumption that the property involved is community property and the court found[2] that

> "* * * the assets of the Portland business of Mr. Griffith are considered community property * * *" (Tr 101)

A determination by the trial court on the community character of property is conclusive upon an appellate court unless the finding is successfully challenged on the grounds of insufficient evidence. *Stone v Walsworth*, 115 CA2d 369, 252 P2d 39 (1953). But here respondent acquiesced in the finding and took no appeal.

The question here is whether community property is subject to the claim of a creditor holding a separate obligation of the husband. The Washington Supreme Court has repeatedly held that community property is not subject to claims arising in another state where by the law of that state the debt is a separate obligation.

In *Re Wallace*, 22 F2d 171, (ED SD Wash 1927), Wallace became bankrupt "individually as to his own

2. Where the trial judge's opinion contains a clear understanding of the basis of the decision below, it will be treated as findings of fact. *Hazeltine Corporation v. General Motors Corporation*, 131 F2d 34, 37 (CCA 3, 1942); *Burnham Chemical Co. v. Borax Consolidated*, 170 F2d 569 (CA 9, 1948). Findings "* * * can be incorporated in the court's opinion" 5 Moore's Federal Practice 2657, and when articulated as part of the decision-making are given greater weight on review than when prepared *ex post facto* by counsel. *Roberts v. Ross*, 344 F2d 747 (C A 3, 1965)

separate property and debts, and not as to the community property and debts of himself and Myrtle Wallace, his wife."

One of Wallace's creditors took precisely the position urged herein by the trustee. He claimed that cash acquired since the marriage should vest in the trustee for the benefit of the separate creditors of the husband. The court held that the cash acquired after marriage was not subject to the claims of the husband's separate creditors. At page 173 the court said:

> "* * * If the objecting creditor here is correct in his contention, it follows necessarily that by filing the petition in bankruptcy the husband thereby and at that moment passed to the trustee, thereafter to be appointed, the legal title, not to a moiety of the community personal property, but to all of it, and by that act subjected the whole of it to the satisfaction of the petitioner's separate debts, to the utter annihilation of the wife's rights in the property, and to the complete extinguishment of the rights of community creditors, if any such there be.
>
> * * * * *
>
> "Clearly under the petition in this case the bankrupt has not, in the exercise of his discretion, voluntarily assented to the subjection of the community personalty to the payment of his separate debts. He expressly does the precise contrary. Moreover, even though the petitioner had actually intended to subject the community personal property to the satisfaction of his separate debts, how could such an attempt be said to be an act of agency performed in the interest of the community? Such an attempt on his part would have been a palpable fraud upon the rights of the wife, and would not be countenanced

> or tolerated. 'It is one of the fundamental postulates of the community property system that the husband must not convey or transfer the community assets with intent to defraud the wife; *that is, with intent to deprive her of any part of her share.*' McKay, Community Property (2d Ed) § 721." 22 F2d 173

In *Achilles v Hoopes*, 40 Wn2d 664, 245 P2d 1005 (1952), defendants, husband and wife, were domiciled in Washington. The defendant husband incurred a separate liability on a promissory note in Oregon. The court held:

> "Recovery cannot be had against the community for the separate obligation of one spouse." (245 P2d 1006)

In *Mountain v Price*, 20 Wn2d 129, 146 P2d 327 (1944), a Washington husband incurred a separate liability in Oregon. Although the liability would have been a community obligation in Washington, Oregon law governed as to the nature of the liability and the community property was held not affected by the separate liability of the defendant husband.

Collier states that the community property is not subject to the claims of creditors of one spouse:

> "* * * where the wife has been adjudged bankrupt, it has been held that the community property does not pass to the trustee, nor may the wife's trus-

tee compel a division of the property so as to subject her interest to the payment of her debts. * * *" 4 Collier on Bankruptcy (14th Ed) 1079

On the specific problem presented in this case Collier says:

"A further problem arises where a petition in bankruptcy is filed by a husband 'individually as to his own separate property and debts, and not as to the community property and debts of himself and his wife.' It has been held that in such a case the community property does not pass to the husband's trustee in bankruptcy. * * *" 4 Collier on Bankruptcy (14th Ed) 1080

4. There was no evidence of any "transfer" and it is no fraud to deposit money in the bank.

A transfer is defined by Section 1(30) of the Bankruptcy Act as:

" 'Transfer' shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor;" 11 USC § 1(30)

It was stipulated in this case that on May 8, 1962 the bankrupt and his wife had on deposit in Seattle First National Bank in Vancouver, Washington, the sum of $42,259.89 and that on that date they withdrew that sum from their account at Seattle First National Bank and deposited it in their account at First Independent Bank, Vancouver, Washington (R 21). The court found these funds to be community property (Tr 101). Reference to the sum of $42,259.89 is found only in connection with the deposit on May 8, 1962.[3] If that transaction is claimed to be the "transfer", it fails to qualify as a "transfer" for these reasons:

(1) The funds were not the property of the bankrupt—they were the property of the marital community.

(2) There was no "disposing of or of parting with"[4] the property—the rights and estate in said property remained exactly the same after May 8 as they had been before.

(3) The bankrupt's estate was in no way diminished by the deposit in the First Independent Bank. The bankrupt had no estate in said funds but if he

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3. The findings do not state the date of the alleged "transfer", but there is no evidence of any act or transaction involving the sum of $42,259.89 except the deposit on May 8, 1962.

4. This is the language of the Bankruptcy Act defining a transfer in Sec 1(30) of the Bankruptcy Act. 11 USC § 1 (30).

had it would not be affected by the deposit in a bank.

5. The findings are not supported by evidence, are clearly erroneous and in any event do not support the judgment.

(1) The court found that the property here involved was community property (Tr 101). The only finding relating to the alleged "transfer" is that Steward Griffith and Merle Griffith in December, 1961 "began depositing substantially all of their assets and funds with banking institutions in Vancouver * * *" (R 61). There is no evidence that these deposits encompassed "substantially all of the assets and funds" of these parties, but in any event the deposit of funds of the marital community does not involve any transfer of the bankrupt's property nor does such a finding support a judgment for a fraudulent transfer of the bankrupt's property.

(2) There are no findings which would make applicable Sections 67d(2)(a), (b) or (c) of the Bankruptcy Act 11 USC 107(d)(2)(a)-(c) inclusive or RCW 19.40.040, 19.40.050, 19.40.060 (i.e. insolvency, unreasonably small capital, or intention to incur debts beyond ability to pay as they mature).

A person is insolvent under the state statute "when the present fair salable value of his assets is less than

the amount that will be required to pay his probable liability on existing debts as they become absolute and matured," RCW 19.40.020, but is insolvent under the Bankruptcy Act "when the present fair salable value of his property is less than the amount required to pay his debts; * * *" Sec 67d(1)(d) Bankruptcy Act; 11 USC § 107(d)1(d).

There is neither evidence nor finding of either type of insolvency of the bankrupt. The court did find that Steward Griffith and Merle Griffith became insolvent in December, 1961 but the finding of insolvency of the marital community (R 61) is of course immaterial. The finding is unsupported by any evidence and is clearly erroneous.[5]

(3) Sections 67d(2)(d) of the Bankruptcy Act, 11 USC § 107(d)(2)(d) and RCW 19.40.070, involving actual intent to hinder, delay or defraud creditors are inapplicable.

There is no finding that any act of the bankrupt defrauded any of his creditors. There are only two findings relating to this point. One is that the activities of Steward Griffith and Merle Griffith (the marital community) in connection with the deposit of $42,-259.89 (community property) were done "with deliberate intent to frustrate the bona fide claims of *their*

5. We direct appellee's attention to Rule 18 of this Court requiring that references be made to the record showing where evidence may be found to support a challenged finding.

Oregon business creditors" (emphasis supplied) (Finding X, R 61). The intent to frustrate claims of creditors of the community is of course immaterial since it is only Steward Griffith's creditors who are here involved (R 21). There is no evidence of frustration of the claims of *their* creditors by Steward Griffith and Merle Griffith, but if there were it would be simply irrelevant. Also immaterial is mere intent if no defrauding results. Here there is no allegation, evidence or finding that any creditor with a provable claim[6] was defrauded. The finding that the property involved was community property precludes the possibililty of defrauding separate creditors by the transfer of such property.

The second finding relating to fraud is that the deposits were "a deliberate fraud perpetrated by Steward Griffith and Merle Griffith upon *their* Oregon business creditors" (Finding XII, R 62) (emphasis supplied). Again, the finding relates to the creditors of the community, but it is stipulated that only the claims of separate creditors of Steward Griffith are involved in this bankruptcy. This finding is irrelevant and there is no finding relating to the actions of Steward Griffith, the bankrupt, or of any effect upon the creditors of the bankrupt. The application of RCW 19.40.070 is of course governed by Washington law which clearly provides

6. "Before a transfer or obligation is 'null and void' it must be fraudulent, under the terms of paragraphs (2), (3), and (4) of § 67d, against creditors of the debtor-transferor 'having claims provable under this Act' * * *". 4 Collier on Bankruptcy (14th Ed) 415; 11 USC § 107(d)(6)

that community property is not applicable to the claims of separate creditors of the husband. See argument under Point 3, supra, p 17.

(4) There is no evidence or finding to support a judgment in the amount of $42,259.89. That sum was deposited by the marital community in a bank in Vancouver, Washington, on May 8, 1962 under Mrs. Griffith's maiden name, M. M. Knowles (R 21). Other moneys remained on deposit in the S & M Enterprises account and some of the funds of each account were advanced to the bankrupt and by him paid to creditors (Tr 38). There remained in the M. M. Knowles account $8,057.23 (Exh 3) and in the S & M Enterprises account the sum of $10,743.72 (Exh 1) at the date of bankruptcy. Had the community released its rights in this property to the Trustee, there would not have been $42,259.89, but some lesser amount. It is undisputed that some of these funds were prior to bankruptcy advanced to the bankrupt and by him paid to creditors (Tr 38).

(5) The court made no finding that Gerald Davis or Anne Buckner or Columbia Acoustics, Inc. "conspired with, aided and abetted the bankrupt" as contended by appellee (R 25). There is no evidence or finding that said appellants received any part of the property allegedly transferred in fraud of creditors.

The court found expressly that these defendants had not engaged in any fraudulent conduct. At Transcript 105-106 the court said:

> "Well, I do not find that any parties other than the bankrupt and wife were guilty of conduct amounting to fraud, and not any one of the other parties Defendant will be held chargeable with fraud."

For these reasons the findings support no judgment against defendants Gerald Davis, Anne Buckner or Columbia Acoustics, Inc.

(6) There is no finding that any action by Steward Griffith caused any damage to any of his creditors. Findings V, VIII, IX, X, XI and XII describe actions alleged to have been taken by the marital community in regard to creditors of the marital community. These findings are irrelevant to the claim of appellee which is based on the rights of separate creditors of Steward Griffith. It is stipulated that all creditors in this bankruptcy "are separate creditors of the bankrupt and their claims are limited to his separate estate" (R 21). Since there are no findings relating to the separate creditors of Steward Griffith or to his separate estate, the findings do not support the judgment.

CONCLUSION

For the reasons stated, the judgment should be reversed and the complaint dismissed.

Respectfully submitted

McCOLLOCH, DEZENDORF & SPEARS

HERBERT H. ANDERSON

STANLEY R. LOEB

NED HALL

APPENDIX A

EXHIBITS*

Exhibit No.	*Identified*	*Offered*	*Received*
1	Pretrial Order—R 27	34	35
2	Pretrial Order—R 27	32	34
3	Pretrial Order—R 27		35, 38
4	Pretrial Order—R 27		62
5	Pretrial Order—R 27	47	54
6	Pretrial Order—R 27	48	54
7	24	24	39
8	61	61	62
9	27	No	No
10	Pretrial Order—R 27	No	No
11	28	No	34
12	No	No	No
13	51	51	54
14	31		34
15	31		38
16	37	37	37
17	73		
18	Pretrial Order—R 27	No	No
19	Pretrial Order—R 27	No	No
18(a) 19(a)	These documents were erroneously referred to as Exhibits 18 and 19 (Transcript 79) The documents were not marked as such. They were offered in evidence by plaintiff (Transcript 80) but were not received.		

* References are to transcript pages, except for Record references indicated by "R."

CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

Attorney

No. 20134

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

WASHINGTON STATE BOWLING PROPRIETORS ASSOCIATION, INC., a corporation, PIERCE-OLYMPIC BOWLING PROPRIETORS ASSOCIATION, INC., a corporation, TOWER LANES, INC., a corporation, BOWLERO, INC., a corporation, DAFFODIL BOWL, INC., a corporation, PARADISE BOWL, INC., a corporation, C. A. LOYD and JANE DOE LOYD, his wife, d/b/a SIXTH AVENUE LANES, THEODORE TADICH and JANE DOE TADICH, his wife, DEZ ISAACSON and JANE DOE ISAACSON, his wife, KENNETH KULM and JANE DOE KULM, his wife, PHILLIP CUNNINGHAM and JANE DOE CUNNINGHAM, his wife, CLEVE REDIG and JANE DOE REDIG, his wife, and ART UNKRUR and JANE DOE UNKRUR, his wife,

Appellants,

vs.

PACIFIC LANES, INC., a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

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Appellants,

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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

NATURE OF THIS APPEAL

This is an appeal from a judgment for plaintiff (appellee in this Court) in an action for damages under the antitrust laws (15 U.S.C. §§ 1, 2, 15). The District Court had jurisdiction of the case under 15 U.S.C. § 15. This Court has jurisdiction to hear the appeal under 28 U.S.C. § 1291.

PARTIES

Pacific Lanes, Inc., appellee, owns and operates a bowling alley in Tacoma, Washington. R. 161. Charles Hoffman is president of the company and manages the business. Tr. 336-337. Appellants Washington State Bowling Proprietors Association, Inc. (WSBPA) and Pierce-Olympic Bowling Proprietors Association, Inc. (P-OBPA) are incorporated associations of bowling alley proprietors. R. 161. They are affiliated with Bowling Proprietors Association of America, Inc. (BPAA) a national association incorporated in Illinois and named as a co-conspirator in this case. R. 161, 171. The remaining defendants are four corporations and seven men and their wives who operate bowling alleys and belong to the defendant associations. R. 161-162. The fact that the acts found unlawful in the trial court arose from a concert of action among the defendants and others has not been contested.

ISSUES FRAMED BY THE PRETRIAL ORDER

The complaint originally filed alleged violations of both the Sherman Act and the Clayton Act, and named the BPAA as an additional defendant. R. 1-8. Service as to the BPAA was quashed (R. 20), it was thereafter named as a co-conspirator (R. 171), and only the Sherman Act violations were pursued.

Before trial, the parties presented an agreed pretrial order, which was signed by the District Judge. R. 160-187. The pretrial order superseded the pleadings, and controlled the subsequent course of the action. Rule 16, F. R. Civ. P.

The main issues were framed in the pretrial order by the following allegations of plaintiff (R. 165-174):

• That "at all times material to this case, the defendants, together with the Bowling Proprietors Association of America, Inc., and other persons and corporations, have been engaged in an unlawful combination and conspiracy which has extended throughout the United States, including Western Washington. The aims of this conspiracy have been to establish and impose unreasonable restrictions in the trade and commerce of bowling, to suppress and restrict competition in the bowling industry, to monopolize the industry and impose non-competitive conditions on it, and to discriminate against bowling establishments which are not members of the Bowling Proprietors Association of America, Inc., and its affiliated organizations such as the Washington State Bowling Proprietors Association, Inc. and Pierce-Olympic Bowling Proprietors Association, Inc."

• That "the said combination and conspiracy have consisted of a continuing agreement and concert of action by and between the defendants, and other parties, the substantial terms of which have been that the defendants agree:

"1. to conduct, sponsor and sanction bowling tournaments so as to make them open only to those persons who restrict, or who agree to restrict, their league bowling and tournament bowling entirely to establishments which are members of the three bowling proprietors associations, rejecting and declaring ineligible for the tournaments any bowler who does, or who has done, any organized bowling in an establishment not belonging to the association. These restrictions have been carried out by the adoption and enforcement of so called 'eligibility rules' . . . The intended and actual effect of the said agreements, rules and practices has been and is to deprive non-member establishments of the patronage of persons who wish to engage in organized bowling, to enforce a boycott against non-member establishments, and thereby to suppress competition and monopolize the bowling industry.

"2. To limit and restrict the number and size of bowling establishments by coercing and dissuading others from building or expanding such establishments, and by soliciting suppliers and manufacturers of bowling equipment, and other persons, not to deal with such persons . . .

"3. To fix and stabilize, insofar as possible, the prices charges for bowling, and to refrain from competing for the patronage of bowlers except as against non-member establishments.

"4. To regulate and control throughout the United States, including Western Washington, the number of bowling establishments, the size of bowling establishments, and the conditions under which bowling may be carried on, all for the purpose of monopolizing and eliminating competition in the bowling industry . . ."

• That "the conspiracy and combination of defendants and their co-conspirators have been in restraint of interstate commerce, and have affected interstate commerce, as to the flow of interstate shipments of equipment, goods and merchandise, equipment rental payments and other payments made across states lines, interstate travel in connection with bowling events, and the conduct of nationwide and multi-state bowling tournaments and events having substantial interstate commerce aspects as aforesaid . . ."

• That "as a direct and proximate result of the combination and conspiracy hereinabove alleged, plaintiff has been injured in its business to its damage, to date, in the amount of $50,000."

These allegations were denied by defendants, joining the issues for trial.

VERDICT AND JUDGMENT

The District Judge submitted special interrogatories to the jury. The jury answered them by specifically finding that all defendants had conspired to

restrain trade in violation of Sherman Act § 1; that all defendants had conspired or attempted to monopolize a part of commerce in violation of Sherman Act § 2; that defendants' unlawful acts had substantially affected the interstate commerce portion of plaintiff's business, and that the portion affected was neither insignificant nor insubstantial; that the unlawful acts also substantially affected other interstate commerce; that defendants' violations had caused financial loss to plaintiff's business; and that the amount of the loss was $35,000. R. 219-223.

After the verdict defendants moved for judgment n.o.v. or for a new trial. R. 227. The District Court filed a memorandum decision denying the motions. R. 232-248. For convenience, the District Court's decision is reproduced as Appendix D to this brief. Judgment was entered on the jury's verdict for $127,500 plus costs, the amount consisting of $105,000 as treble damages and $22,500 as attorney fees. R. 249-251.

SUMMARY OF EVIDENCE

Bowling is a substantial line of commerce. In 1962 revenues from the sale and lease of bowling equipment in the United States exceeded $300,000,000. R. 95. Yearly bowling alley receipts in Washington alone are about $13,500,000. Ex. 225.

Members of the BPAA and its affiliates own and operate about 80 per cent of all commercial bowling lanes in the country, and about 90 per cent in Washington. R. 114, Tr. 702. Membership in the associations is interlocked at all levels; to belong to the BPAA, a proprietor must also join the state and local affiliates, and *vice versa*. Tr. 130-31, Exs. 55, 130.

When the popularity of bowling increased in the 1950's following invention of automatic pinsetting machines, the associations and their members combined to keep newcomers out and monopolize the field. In 1957 the BPAA formed an "overbuilding committee". Ex. 1, Tr. 187-88. It asked the state associations to form "overbuilding committees" and many did. Ex. 6, Tr. 187-188. The committees brought pressure on equipment manufacturers not to supply would-be proprietors, threatened newcomers with non-membership in the association, and sought to "saturate" areas with lanes built by existing proprietors while telling others there was no room for new establishments. The overbuilding committees' effects in monopolizing and restraining commerce are summarized *infra*.

One aim of the "overbuilding" activities of defendants was price stabilization. Discussing the committee's work in 1959, the BPAA president said, "Once the price structure collapses we are all in trouble." Ex. 22. In Washington, applicants for membership were asked to bring their prices up to the level charged by members, and price schedules were arrived at in association meetings. Tr. 235, 422-29, 962, 1117-19, 1121.

Defendants used bowling tournaments to eliminate competition in the industry. Tournaments are valuable in producing revenue and stimulating interest. Ex. 227. They are an important inducement to people to engage in league bowling; and league bowling accounts for about half the industry's income. Tr. 143, R. 95. Defendants adopted "eligibility rules" which banned bowlers from tournaments unless they did *all* their league and tournament bowling in member establishments, and none in other houses. Both the BPAA and WSBPA enforced this

rule, with minor variations. Tr. 202-217, R. 163-4. The purpose of the "eligibility rule" was to injure independent competitors by forcing bowlers to boycott them as a condition of entering tournaments. The evidence proving this is summarized *infra*. Independent houses were forced into the association. One member testified he joined "Because we have no real alternative. We have to be a member in order to have bowlers. We have no choice." Tr. 752.

Initiation fees were high, often amounting to several thousand dollars, and some houses could not afford to join. Ex. 64, Tr. 802-803, Ex. 168, Tr. 791.

In 1963 the BPAA changed its eligibility rule to provide a bowler would be eligible if he bowled in one league in a member house; this was done "in keeping with the demands of the Federal Justice Department and many local and state antitrust laws . . ." Ex. 228. However, the WSBPA did not follow suit but provided that bowlers giving some business to a non-member house would be ineligible unless they applied specially for an "eligibility card." R. 165. The eligibility application form was so complicated that even the WSBPA president could not tell how to fill it out. Ex. 201, Tr. 382. Bowlers found the questionnaire impossible and gave up trying. Tr. 104-105, 503, 870, 885, 879. The few who persisted could not get forms, or could not get their cards in time. Ex. 167, Tr. 885, 783, 724, 650-52. As a result the new rule worked the same as the old one; at the time of trial only 30 eligibility cards had been furnished by defendants while thousands bowled in association-sanctioned tournaments. Tr. 1778. The overwhelming majority of bowlers continued to boycott independent houses.

In the WSBPA "Code of Ethics" members agreed

When the popularity of bowling increased in the 1950's following invention of automatic pinsetting machines, the associations and their members combined to keep newcomers out and monopolize the field. In 1957 the BPAA formed an "overbuilding committee". Ex. 1, Tr. 187-88. It asked the state associations to form "overbuilding committees" and many did. Ex. 6, Tr. 187-188. The committees brought pressure on equipment manufacturers not to supply would-be proprietors, threatened newcomers with non-membership in the association, and sought to "saturate" areas with lanes built by existing proprietors while telling others there was no room for new establishments. The overbuilding committees' effects in monopolizing and restraining commerce are summarized *infra*.

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rule, with minor variations. Tr. 202-217, R. 163-4. The purpose of the "eligibility rule" was to injure independent competitors by forcing bowlers to boycott them as a condition of entering tournaments. The evidence proving this is summarized *infra.* Independent houses were forced into the association. One member testified he joined "Because we have no real alternative. We have to be a member in order to have bowlers. We have no choice." Tr. 752.

Initiation fees were high, often amounting to several thousand dollars, and some houses could not afford to join. Ex. 64, Tr. 802-803, Ex. 168, Tr. 791.

In 1963 the BPAA changed its eligibility rule to provide a bowler would be eligible if he bowled in one league in a member house; this was done "in keeping with the demands of the Federal Justice Department and many local and state antitrust laws . . ." Ex. 228. However, the WSBPA did not follow suit but provided that bowlers giving some business to a non-member house would be ineligible unless they applied specially for an "eligibility card." R. 165. The eligibility application form was so complicated that even the WSBPA president could not tell how to fill it out. Ex. 201, Tr. 382. Bowlers found the questionnaire impossible and gave up trying. Tr. 104-105, 503, 870, 885, 879. The few who persisted could not get forms, or could not get their cards in time. Ex. 167, Tr. 885, 783, 724, 650-52. As a result the new rule worked the same as the old one; at the time of trial only 30 eligibility cards had been furnished by defendants while thousands bowled in association-sanctioned tournaments. Tr. 1778. The overwhelming majority of bowlers continued to boycott independent houses.

In the WSBPA "Code of Ethics" members agreed

to reject from tournaments anyone who bowled in a league in a non-member house. Ex. 59. The Code was taken from the BPAA magazine. Exs. 192, 261g, Tr. 2417-2419. In 1963 the BPAA advised affiliates under the antitrust laws to take certain provisions out of their codes of ethics; WSBPA directed a committee to work on this, but the original code was still in effect at the time of trial. Exs. 188, 193, 214, Tr. 2421-25. The code also prohibited solicitation of customers from fellow members and the offering of special inducements to get business, and provided that violators could be suspended. Ex. 59.

The associations at all levels retained the power to discipline members by fine or expulsion. Tr. 132, 1654, Ex. 67.

In 1959 the WSBPA overbuilding committee told Hoffman they would not let him build Pacific Lanes. Tr. 574. Plaintiff built anyway and joined the association in the fall of 1959. In 1960 the P-OBPA charged plaintiff with accepting the business of two leagues without notifying the houses from which they were moving. Ex. 75. A "hearing" was held; Hoffman had 20 minutes advance notice, was not in the room when witnesses testified against him, and was not advised of any right to appeal. Tr. 2445-46. In practice the association ordinarily thought it sufficient if the league secretary notified the house from which the league was moving. Tr. 1034. This had been done by the secretaries when the two leagues in question decided to move to Pacific. Tr. 2188-9, 968, Ex. A-78. Nevertheless plaintiff was found guilty and sentenced to suspension for two years or a $1,000 fine. Ex. 92. In the face of this plaintiff resigned from the association. Tr. 582-3, 1126.

Pacific's bowlers remained eligible for tourna-

ments through the 1960-61 season. Ex. 98. Beginning in 1961-62 the rule was extensively enforced and plaintiff's bowlers were rejected from tournaments. Tr. 473-476, 482, 489-490, 500, 532-33, 559-60, 665-67, 675, 680-81, 685, 690, 778, 877, 993-5, 1021, 1028, 1039, 1070, 1073, 1079, 1754, 2351. Because of this plaintiff lost the business of leagues, teams, and individual bowlers each season to the time of trial. The evidence of damages is summarized *infra*.

SUMMARY OF ARGUMENT

Two features appear throughout appellants' brief: First, their arguments are mostly afterthoughts—issues which were not raised in the trial court and which cannot be raised for the first time on appeal. Second, they seek to re-argue disputed factual issues on which there was conflicting evidence and which were resolved against them by the jury's verdict. In both respects appellants seek to go beyond the bounds of appellate review.

The group boycott instruction given by the District Court was not excepted to by defendants. It is therefore the law of the case and cannot be attacked on appeal. The instruction was correct in any event in stating the rule that group boycotts (concerted refusals to deal with prospective customers) are illegal per se. The court did not instruct that the "eligibility rule" was an illegal boycott, although the evidence was overwhelming that it was. The one requested instruction to the refusal of which defendants excepted was not a correct statement of the law. There was no error on the boycott issue.

In any event, appellants' arguments about the boycott instructions all relate to the alleged violations of Sherman Act § 1. The jury also made a special finding that defendants committed the sep-

arate offense of conspiring or attempting to monopolize commerce in violation of Sherman Act § 2. This finding was supported by clear evidence of intent to monopolize coupled with actual control of 90 per cent of the industry. The special finding on Sherman Act § 2 independently sustains the verdict and moots the argument about the boycott instructions.

The court correctly submitted to the jury the damages issue for the three past bowling seasons 1961-62, 1962-63, and 1963-64. Although the complaint was filed in 1961, defendants before trial in 1964 stipulated to a pretrial order which framed the issues to include damages through the spring of 1964. The pretrial order superseded the pleadings and made it unnecessary to file a supplemental complaint before trial, which plaintiff otherwise could have done. Both sides prepared to try the damages issue through the 1963-64 season, and introduced proof of many events which occurred after 1961. Defendants did not except to the court's instruction submitting the damages issue from the time plaintiff left the association through the 1963-64 season.

Appellants seek to argue that the damages evidence was insufficient, but did not raise this issue in the trial court. Their motion for directed verdict was grounded solely on the claim that interstate commerce was not sufficiently involved. Appellants have disregarded Rule 50, F.R.Civ.P., and may not raise the damages question for the first time on appeal.

There was ample proof of the fact of damages in any event, and the jury's finding on amount of damages is supported both by the evidence of plaintiff's lost league income and approximate open play loss, and by comparison of plaintiff's revenues with those of its two most similar competitors.

The jury's special verdicts on interstate commerce were based on substantial evidence. Plaintiff's and other proprietors' interstate equipment rental payments were lowered by the conspiracy. The eligibiility rule reduced interstate travel of bowlers and imposed the qualitative restraint of limiting such travel to those who boycotted independent bowling houses. The conspirators' price stabilization scheme was effected through an interstate instrumentality, the BPAA. The overbuilding committees directly restrained commerce by blocking the sale and lease of equipment to would-be bowling proprietors. All of these activities were parts of defendants' conspiracy to restrain and monopolize the industry and administer it privately under non-competitive conditions.

THE GROUP BOYCOTT INSTRUCTIONS

(Answering Appellants' Point 1, Br. 45-46, 50-62)

No Proper Exception was Taken to the Group Boycott Instruction Given

Appellants' first specification of error begins with the words: "The boycott instructions given by the Court were erroneous." Br. 45. In the trial court appellants did not claim the boycott instruction *given* by the Court was wrong, and conceded it was a correct statement of the law. They argued only that it should have been "balanced" by additional instructions, and excepted only to the court's refusal to give one of their requests. As to the instruction given they have not complied with Rule 51, F.R.Civ.P.:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto . . . stating distinctly the matter

to which he objects and the grounds of his objection."

During trial the proposed group boycott instruction was discussed at a conference in chambers. Tr. 2023-2033. Defendants advised the court of their position on it as follows:

> "In other words, that this eligibility rule constitutes a boycott is the plaintiff's theory, *but we think there should be an instruction given with the boycott instruction* that would be on our theory that the rule is a legitimate, or rather, that the defendants have a right to pass rules for the regulation." (Emphasis added.) Tr. 2025.

After the charge was read to the jury appellants said "in the context given this is erroneous and misleading" but directed their exception to the absence of additional instructions:

> "Although these instructions on boycott articulate the plaintiff's theory, the court failed in any of the instructions to advise the jury as to the defendants' theory based upon Professor North's testimony that the purpose of the alleged rule is to recognize and promote competition." Tr. 2804.

Following the verdict, in arguing for a new trial, defendants still did not contend the group boycott instruction given was erroneous. Thus the District Court stated in its memorandum decision:

> "Regarding the group boycott instruction, the defendants do not contend that it is an incorrect statement of the law. The claimed error is that in failing to give requests 23, 27 and 29 the group boycott instruction by itself was 'misleading,' and its 'misleading' effect could only be overcome by 'balancing' with the defendants' request." R. 236, Appendix D, *infra*.

On appeal, appellants expressly conceded that the group boycott instruction given was correct, and assigned error only to the court's refusal to give certain requests. Point C in their statement of points filed pursuant to Rule 17 (6) of this Court reads:

> "C. *The court gave an instruction to the jury which adequately incorporated the rule that 'group boycotts' are per se violations of the anti-trust laws* and 'reasonableness' is no defense. However, the jury was not instructed that there are some acts in restraint of trade or with a monopolizing tendency that are permissible if they meet the test of reasonableness. Proposed Instructions No. 23, No. 27, and No. 29 were attempts by which appellants hoped to explain this to the jury. But the court refused to give them, and, thus, the jury was never instructed on the possible application of the rule of reason." (Emphasis added.) R. 260-261.

A party who does not except to an instruction given by trial court "stating distinctly the matter to which he objects and the grounds of his objection" has no standing to attack the instruction an appeal. *Sears v. Southern Pacific Co.,* 313 F.2d 498 (9th Cir. 1963); *Brown v. Chapman,* 304 F.2d 149 (9th Cir. 1962); *Hargrave v. Wellman,* 276 F.2d 948 (9th Cir. 1960); *Richfield Oil Corp. v. Karseal Corp.,* 271 F.2d 709 (9th Cir. 1959), cert. den., 361 U.S. 961, 4 L.Ed.2d 543.

One who merely objects to the *giving* of one instruction on the ground the court failed to give another *requested* instruction fails to preserve any claimed error for appeal as to the given instruction. *Richfield Oil Corp. v. Karseal Corp., supra* at 221-22. And one who merely objects to an instruction on the

ground that it is an incomplete statement of the law raises no appealable issue. *Boeing Airplane Co. v. O'Malley,* 329 F.2d 585 (8th Cir. 1964).

Here, defendants raised no issue as to the instruction given; it therefore became the law of the case and the yardstick for measuring the sufficiency of the evidence. *State Farm Mutual Auto. Ins. Co. v. Porter,* 186 F.2d 834, 845 (9th Cir. 1950).

The Boycott Instruction Was Correct

Group boycotts—concerted refusals by a group engaged in some line of business to deal with others outside the group, or to deal with others unless they in turn boycott the group's competitors—are illegal per se. They necessarily distort a free economy and transgress government's exclusive right to regulate commerce. In *Northern Pacific Ry. v. United States,* 356 U.S. 1, 2 L.Ed.2d 545 (1958) the Supreme court held:

> "... there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States v.*

Socony-Vacuum Oil Co., 310 U.S. 150, 210 . . .; division of markets, *United States v. Addyston Pipe and Steel Co.*, 85 F. 271 . . ., aff'd., 175 U.S. 211 . . .; group boycotts, *Fashion Originators' Guild v. Federal Trade Com.*, 312 U.S. 457 . . .; and tying arrangements, *International Salt Co. v. United States, Id* at 5, 2 L.Ed.2d at 549-51, 332 U.S. 392 . . ."

Since a group which boycotts others is "an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, . . . [it] 'trenches upon the power of the national legislature and violates the statute'." *Fashion Originators' Guild, Inc. v. Federal Trade Comm'n.*, 312 U.S. 457, 465, 85 L.Ed. 949, 953 (1941).

Thus, concerted refusals to deal have been held unlawful in: *Montague & Co. v. Lowry*, 193 U.S. 38, 48 L.Ed. 608 (1904); *Loewe v. Lawler*, 209 U.S. 274, 52 L.Ed. 488 (1908); *Eastern States Retail Lumber Dealers' Ass'n. v. United States*, 234 U.S. 600, 58 L.Ed. 1490 (1914); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 89 L.Ed. 951 (1945); *Fashion Originators' Guild, Inc. v. Federal Trade Comm'n*, 312 U.S. 468, 85 L.Ed. 949 (1941); *Keifer-Stewart Co. v. Jos. Seagram & Sons, Inc.*, 340 U.S. 211, 95 L.Ed. 219 (1951); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 625, 97 L.Ed. 1277 (1953); *Radovich v. National Football League*, 352 U.S. 445, 1 L.Ed.2d 486 (1957); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 3 L.Ed.2d 741 (1959); *Radiant Burners, Inc. v. Peoples Gas, Light and Coke Co.*, 364 U.S. 656, 5 L.Ed.2d 358 (1961); *White Motor Co. v. United States*, 372 U.S. 253, 9 L.Ed.2d 738 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341, 347, 10 L.Ed.2d 389 (1963); *Standard Oil Co. of California v. Moore*, 251 F.2d 188 (9th Cir. 1957), cert. den., 356 U.S. 975, 2 L.Ed.2d

1148; *Jerrold Electronics Corp. v. Wescoast Broadcasting Co.,* 341 F.2d 653, 661 (9th Cir. 1965).

The illegality of group boycotts lies "not in the separate action of each, but in the conspiracy and combination of all, to prevent any of them from dealing with . . . [another]." *Binderup v. Pathe Exchange, Inc.,* 263 U.S. 291, 312, 68 L.Ed. 308, 317 (1923). Accord, *Kiefer-Stewart Co. v. Jos. Seagram & Sons, Inc. supra; Paramount Famous Lasky Corp. v. United States,* 282 U.S. 30, 41, 75 L.Ed. 145 (1930); *United States v. First National Pictures, Inc.,* 282 U.S. 44, 75 L.Ed. 151 (1930). The exclusion of others need not be absolute, *Montague & Co. v. Lowry,* 193 U.S. 38, 48 L.Ed. 608 (1904); *United States v. Terminal R. R. Ass'n,* 224 U.S. 383, 46 L.Ed. 810 (1912), and competition need not be wholly suppressed for the activity to be unlawful. *Paramount Famous Lasky Corp. v. United States, supra.*

Since concerted refusals to deal are unlawful regardless of the surrounding circumstances, the trial court may refuse to admit evidence of claimed reasonableness offered by defendants. *Fashion Originators' Guild, Inc. v. Federal Trade Comm'n, supra; Klor's, Inc. v. Broadway-Hale Stores, Inc. supra.*

Appellants here rely on two Ohio district court cases—*United States v. United States Trotting Ass'n,* 1960 Trade Cases, par. 69, 761 (S.D. Ohio 1960) and *United States v. Insurance Board of Cleveland,* 144 F.Supp. 684, 188 F.Supp. 949 (N.D. Ohio, 1956, 1960)—which they claim mean that group boycotts are illegal only if they involve "coercive action against parties outside the group." This proposition would conflict with the Supreme Court's ruling that a concerted refusal to deal is illegal because it "takes away the freedom of action of members," *Fashion Originators' Guild, Inc. v. Federal*

Trade Comm'n, supra, and restrains the freedom of the *parties to the boycott* independently to decide whether to deal with the boycotted party, *Kiefer-Stewart Co. v. Seagram & Sons, Inc.,* 340 U.S. 211, 213, 95 L.Ed. 219 (1951). *United States v. U.S. Trotting Ass'n* is not in point. The court there found the association was a non-commercial one open to anyone willing to pay the nominal dues; was a "service organization" which "does not participate directly in any phase of the commercial enterprises which have become associated with the sport;" and the eligibility requirement was a dead letter which had never been enforced. See 1960 Trade Cases, page 76,964.

It is not only the concerted refusal to deal with "other traders," as in *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra,* which violate the Act. Concerted refusals to deal with potential *customers* are equally unlawful, as held by the Supreme Court in *Radiant Burners, Inc. v. Peoples Gas, Light and Coke Co.,* 364 U.S. 656, 35 L.Ed. 358 (1961) (refusal to provide gas to customers who used a certain manufacturer's gas burners not approved by the group) and recently by this Court in *Jerrold Electronics Corp. v. Wescoast Broadcasting Co.,* 341 F.2d. 653, 661 (9th Cir. 1965) (refusal to sell television broadcasting equipment to prospective customers).

Appellants seem to argue that group boycotts are permissible if the participants claim benign motives. This view conflicts with the Supreme Court's holding that they are illegal without inquiry as to the "harm they have caused or the business excuse for their use." *Northern Pacific Ry. v. United States, supra.* A refusal to deal stemming from non-economic motives is as illegal as any other. Thus in *Silver v. New York Stock Exchange, supra,* defend-

ants' refusal to supply wire service to plaintiff was motivated at least in part by the fact that the Defense Department had previously suspended plaintiff's security clearance. See 196 F.Supp. 209, 216-217, 226. Nevertheless the Supreme Court held the refusal an illegal group boycott. 373 U.S. at 347.

Even a claim that defendants acted to prevent the commission of torts by others cannot justify a concerted refusal to deal. In *Fashion Originators' Guild, Inc. v. Federal Trade Comm'n, supra,* the Supreme Court held:

> "Nor can the unlawful combination be justified upon the argument that systematic copying of dress designs is itself tortious. . . . [E]ven if copying were an acknowledged tort . . ., that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in volation of Federal Law." 312 U.S. at 468, 85 L.Ed. at 955.

Anyone injured by the boycott may maintain an action against the conspirators; the plaintiff need not be the one who was directly boycotted. *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., supra;* cf. *Walker Dist. Co. v. Lucky Lager Brewing Co.,* 323 F.2d 1 (9th Cir. 1963).

In the present case the trial court admitted defendants' evidence on the purpose of the eligibility rule, although it could have rejected it, *Fashion Originators' Guild, Inc. v. Federal Trade Comm'n, supra,* and instructed the jury on defendants' contentions about the purpose of the rule. Tr. 2742-43.

The boycott instruction clearly referred to boycotts in commerce:

> "For purposes of this case, a group boycott may be defined as the concerted refusal of a group of persons engaged in some *line of com-*

merce to deal with others—that is, to sell their *goods or services* to others—unless the potential *customers* agree that they will not do *business* with other firms which are competitors of the persons in the group. In other words, a group boycott is a combination of *business concerns* to boycott potential customers unless the customers restrict their *trade and custom* to the members of the group and avoid patronizing outside *competitors*.

"A group boycott is unlawful even though those who are parties to it claim that it was adopted for the purpose of eliminating practices thought by them to be *trade abuses* or *undesirable trade practices*." (Emphasis added.) Tr. 2773-74.

The court could have instructed that the eligibility rule was unlawful, but did not. Instead, it defined unlawful boycotts in general terms and left the issue to the jury. The instruction was clearly correct under all of the authorities in the field.

The Eligibility Rule Was an Unlawful Concerted Refusal to Deal

Appellants argue that the eligibility rule "is not a commercial boycott." Br. 51-54. This appears to be an argument on a fact issue which was resolved against defendants at trial, and is not appropriate on appeal. *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 4 L.Ed.2d 142 (1959). If appellants mean to argue that there was insufficient evidence to take the boycott issue to the jury, they may not do so on appeal for the first time. They did not claim in the trial court that the evidence of boycott was insufficient or that the issue should not be submitted to the jury. Such a claim may not be made for the first time on appeal. *Grant v. United States,*

291 F.2d 746 (9th Cir. 1961), cert. den., 368 U.S. 999, 72 Ed.2d 537; and see the discussion of this rule in the section on Damages, *infra*.

In any event, the evidence was overwhelming that the eligibility rule was a boycott which both sought and achieved commercial impact. It was an agreement of defendants not to deal with others as to tournament bowling *unless the customers entirely boycotted defendants' competitors as to all organized bowling*. It was not enough for defendants if a customer bowled in several leagues in their houses and one in an independent house; they would still ban him from tournament bowling until he withdrew entirely from the independent house and gave all his business to them. Appellants argue that their rule was like the offer of "premiums or trading stamps," and complain that the instructions here meant they "could not lawfully conduct any tournament in which only their customers were eligible." Br. 57, 60. But premiums and trading stamps are given in return for custom, not as payment for boycotting competitors. The eligibility rule was not like an oil company giving merchandise with purchase of its gasoline. Rather, it was like the major oil companies forming an association and refusing to sell premium gasoline at all unless the customer bought all his petroleum products from them and none from companies outside the group. Thus at trial, the WSBPA president was forced to admit that other trade associations do not require customers to do all their business with members, and boycott non-members, as a condition of dealing. Tr. 2400, 2405, 2414-15.

The only other court which has yet ruled on the eligibility rule under antitrust laws is the Superior Court of California for Santa Clara County. In

People v. Santa Clara Valley Bowling Association, Civil Cause No. 125346, now on appeal to the California Supreme Court, the rule was held to be an unlawful group boycott under a state statute similar to the Sherman Act. The Superior Court's conclusions in this unreported case are reproduced as Appendix C hereto, and read in part:

> "The BPAA tournament eligibility rule requiring bowlers to confine their league bowling exclusively to BPAA member establishments . . . constituted a concerted refusal by BPAA members to deal with bowlers who patronized non-BPAA member competitors and a group boycott of such bowlers, a secondary boycott and agreement to coerce bowlers to not deal with non-BPAA members . . . an unreasonable restraint upon trade and commerce, and a trust, against public policy and void . . ." Appendix C, *infra.*

That bowling is "a business, but a business of sport" (Tr. 1972) gives no exemption. Organized sports are subject to the antitrust laws. *Radovich v. National Football League, supra; International Boxing Club v. United States,* 358 U.S. 242 3 L.Ed.2d 270 (1959); *National Wrestling Alliance v. Myers,* 325 F.2d 768 (8th Cir. 1963); *American Football League v. National Football League,* 323 F.2d 124 (4th Cir. 1963); *Washington Professional Basketball Corp. v. National Basketball Ass'n.,* 147 F. Supp. 154 (S.D.N.Y. 1956).

Defendants tried to compare their eligibility rule to those of the ABC; but the ABC is a non-commercial organization which prescribes standards for equipment, scorekeeping, and conduct of tournaments, and its rules do not require a bowler to boycott other tournaments as a condition of entering ABC-sponsored events. Tr. 2394-2396.

Bowling is an industry involving millions of dollars in transactions each year. Between five and seven million men are organized in the ABC (Tr. 142) and about three million women belong to the WIBC (Tr. 228). Including non-members of the bowlers' organiations, approximately thirty-six million Americans bowl each year. R. 95. The Washington State Bowling Association has about 100,000 members (Tr. 76), and the Washington State Women's Bowling Association has about 74,000 (Tr. 228). The yearly gross revenues from bowling in Washington, according to the WSBPA 1964 annual report, are $13,500,000. Ex. 225.

Not only is bowling a substantial line of commerce, but defendants overwhelmingly control it. Tr. 702, R. 114.

League bowling engages about 7,000,000 customers, and accounts for about half of all revenue earned by commercial bowling houses. R. 95. One of the main inducements to any bowler to engage in league bowling is the prospect of participating in tournaments. Tr. 143. In recent years about 500,000 league bowlers have taken part annually in the national BPAA tournaments (R. 114); this figure does not include participation in the tournaments run by affiliated associations and members. A booklet of the BPAA described the business importance of tournaments:

> "The promotion of tournaments has rapidly become an important phase of today's bowling establishment operation . . . Tournaments serve a number of important purposes. Naturally, they are intended to supplement open play lineage . . . Tournament bowlers are, for the most part, the most active and enthusiastic element of the bowling public. The tournament bowler

spends a greater portion of his recreational dollar on bowling." Ex. 227.

The tournaments run by association members were not a financial sacrifice for the purpose of improving the game, as defendants claimed, but a source of additional revenue. Usually a choice had to be made between a number of houses applying for the same tournament. Tr. 150. Announcing a forthcoming tournament to its members, the WSBPA wrote: "Be sure to get your share in 1963$!" (Ex. 156). The 1962 WSBPA Summer League Tournament, a small one, was produced at a net profit (direct costs against entry fees) of $4.42, and brought extra lineage to the association members worth $12,684. Ex. 153. The 1964 report of the WSBPA tournament committee stated:

> "You will be interested in the fact that 155,000 scheduled lines were derived from these tournaments. . . . these lines were gotten at very little expense per lane for proprietors. The lineage is worth, dollar wise, $77,500 to the participating proprietors." Ex. 225.

The same exhibit showed that the $77,500 in revenue was produced at a total cost of $4,391.51.

Nationally, the BPAA income for the year just preceding the 1961 convention was over $768,000; total expenditures were about $493,000; ending cash balance was $662,000; and cash balance in the tournament fund was $191,000. Ex. 128, Tr. 2126-2129.

One tournament alone produced enough profit to pay all association dues for Washington State members. Exhibit 261r is an excerpt from "The Bowling Proprietor", official BPAA magazine, for April, 1963. It reads in part:

> "The total number of lines derived in the house eliminations [in the BPAA Handicap Tourna-

> ment] in Washington in 1962 was 122,490 lines. In the zone finals, another 29,760 lines were rolled, for an amazing total of 152,250 lines—more than 43 extra lines per member lane.
>
> "These 43 lines represent an extra income of $21.50 per lane, which would pay the entire dues package for most BPAA members in most states."

Defendants' professed reason for the eligibility rule was to prevent "sandbagging", the intentional compiling of a low average by a bowler to obtain a high handicap for tournament purposes. Tr. 1655, 1721, 1754, 1871, 2194. But none could testify to any real connection between the rule and the prevention cheating. The ABC—the organization of the bowling competitors themselves, not of the business men who own the bowling alleys—promulgates the rules of fairness in the game and keeps the bowlers' averages. Tr. 89, Ex. 239. No one claimed the ABC was remiss in its duties; defendant Cunningham admitted it does a good job of keeping the averages. Tr. 1872. And "sandbagging" itself was shown to be a myth—not a genuine problem. The witness Doepke, a bowler for 57 years and former president of the San Jose bowlers association, had never seen a case of it. Tr. 539-542. Stowe, secretary of the Tacoma City Bowlers Association, had never known of a substantiated case of it. Tr. 91. No defendant testified to ever having found anyone cheating in his bowling establishment (*e.g.,* Tr. 1758, 2136). Defendant Tadich, a bowling proprietor for many years, was asked if there was any difficulty in running tournaments before the eligibility rule was adopted, and answered: "All the tournaments I run in all the years I have been in the game, I never had any difficulty or no beef from anybody." Tr. 1026-

1028. The league secretaries, not the proprietors, keep the bowlers' scores and averages. Tr. 2195-96. And, of course, if defendants wanted to discuss a bowler's honesty at their meetings they could do so whether or not he did some bowling at an independent house. Tr. 1721.

Beyond this there was much evidence which proved the absurdity of the "sandbagging" argument and showed the conspirators' aim was to enforce a secondary boycott injuring their competitors:

(1) Defendant Redig admitted that a purpose of the rule he heard discussed at association meetings was to prevent league business from going to nonmember houses. Tr. 1757-1758.

(2) Defendant Cunningham admitted hearing discussions at association meetings that a purpose of the rule was to limit or control the number of new bowling establishments. Tr. 1879-1880.

(3) Loveless, asked to give the substance of a conversation with Corbett about the eligibility rule, testified:

> "He stated that the eligibility rule was developed by the members of the Association for the protection of the people in the bowling business, and that the overbuilding situation was something that could run all bowling proprietors out of business, or at least make the situation to where it would not be profitable . . ." Tr. 740-742.

The same explanation was given to Loveless by Cunningham and by Allen Mason, the executive director of WSBPA. Tr. 743.

(4) The rule was explicitly treated by the associations as a way of channeling business to the members. When it was expanded to include tourna-

ment as well as league bowling, the BPAA announced to its members:

> "The above Rule is another big reason why more and more bowlers are aware of the advantages they enjoy by bowling in member houses. Be sure your bowlers are advised of the above rule changes so they will be prepared for next season and remain eligible for the BPAA national events and those sponsored by your local, district and state associations!" Ex. 81.

Referring to a proposed bowling alley at the Eagles Lodge in Yakima, the chairman of the WSBPA Overbuilding Committee wrote:

> "I think these fellows are realizing that having their bowlers barred from tournaments, from the All Star, and from any other BPAA benefits is an important thing and can become increasingly more so." Ex. 16.

(5) Many tournaments, including most of the national ones, are "scratch" tournaments. Tr. 2133. In these the bowlers simply compete for the best score. No handicaps are used, and the bowlers' averages and past scoring records are not involved at all. There is no way to cheat in a scratch tournament. Tr. 1662. Nevertheless, the eligibility rule was enforced in scratch tournaments, and bowlers wishing to enter them were required to do no league or tournament bowling in non-member houses. Tr. 2134.

(6) The rule bars from tournaments anyone who is a part owner or shareholder of an independent bowling house, or who is employed by an independent. R. 163-165, Tr. 1661, 2201. This bar is absolute and has nothing to do with scoring averages or handicaps. Tr. 1661, 2199. An employee of an independent house would be barred from tournaments

even if he did all his organized bowling in association houses. Many proprietors like to hire "name" bowlers and high-average bowlers, especially to work as teachers; and these capable bowlers want to bowl in tournaments. Tr. 208-211. The sole purpose and effect of this part of the rule is to deprive independent houses of employees.

(7) In 1960-61 the rule barred from tournaments any bowler who had done any exhibition bowling in an independent house. Tr. 208-211. Exhibition bowling is commonly done by professional bowlers and is valuable in attracting spectators and potential customers to bowling alleys. It does not count in a bowler's scoring average, and has nothing to do with his handicap for tournament purposes. Tr. 2281. The purpose and effect of this part of the rule was to make it impossible for independent houses to hire professionals to do exhibition bowling.

(8) The rule was enforced against entire teams of five or more bowlers if one team member had bowled in an independent house. All of the members of such teams were disqualified even if most of them did all of their organized bowling in association houses. Tr. 206.

(9) A traveling league is one which goes from house to house, bowling at different alleys on different nights. Bowlers who belonged to a traveling league which did any bowling at an independent house, even one night, were ineligible for tournaments. Tr. 219. A bowler could not gain eligibility by "sitting out" and not bowling on the nights when his league visited an independent house; he was barred from tournaments simply for *belonging* to a league which gave any business to an independent. Tr. 219, 2142-44, Ex. 135.

(10) When an independent house burned down or went out of business, and its bowlers moved to a member house, they immediately became eligible for tournaments. Exs. 109, 110. In such cases their bowling averages from the defunct non-member house would be used for tournament handicap purposes. Tr. 215.

(11) The eligibility rule was enforced not only against adults but also against children through the YBA, the BPAA's youth bowling organiaztion. To be eligible for a YBA tournament, the applicant was required to bowl in an association house; if he lived in a small town having only one bowling alley, and that one independent, he would be barred from tournaments. Tr. 1877. Boys were ruled ineligible for YBA tournaments because they bowled at Pacific Lanes. Tr. 819-820. Asked if this rule was to prevent the children from cheating, defendant Cunningham first answered "Oh, definitely, it is not to prevent cheating" (Tr. 1877) and then changed his answer to "Partially" (Tr. 1878).

(12) The BPAA allowed bowlers to enter tournaments, regardless of where they had bowled in the past, if they signed affidavits that they would in the future restrict their bowling to member houses. Tr. 216, Exs. 43, 119. In such cases the bowler's past average from an independent house would be used in computing his handicap. And the rule was used to force new houses to join the BPAA. Bowlers were allowed to play at a non-member house during the first 30 days of its operation; after that, if the house had not joined the association, they were ineligible for tournaments. Ex. 79.

(13) Defendants not only enforced the eligibility rule themselves, but forced others to do so. The originator of the All-Coast Tournament, Lindblad,

testified that his tournament was the outstanding one in the Northwest; that for several years it was open to all ABC league bowlers; that in 1959 when he moved it to Vancouver, Washington defendants told him they would not cooperate, and would not support the tournament, unless he applied the eligibility rule; and that he had no choice in the matter, enforced the rule against his own wishes, and did so every year thereafter. Tr. 550-563, Ex. 105.

(14) The written version of the rule supposedly exempted tournaments conducted by the ABC or City Bowlers Associations affiliated with it; that is, a bowler could participate in such a tournament even if held at an independent house without forfeiting his eligibility for tournaments held in association houses. Exs. 126, 245. But defendants nonetheless invoked the rule to keep bowlers out of the 1961 Tacoma City Association tournament at Pacific Lanes. Tr. 95-98, 672-673. Defendant Unkrur told Jowett, a bowler, "Well, ways and means will be found to keep you out of the tournament." Tr. 648.

The only reasonable conclusion from this evidence is that the eligibility rule was an unlawful refusal to deal. It coerced the prospective customers to boycott defendants' competitors as a condition of dealing with those in the group. The concerted use of such a secondary boycott violates the Sherman Act. *Walker Dist. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir. 1963).

Defendants' Requested Instructions Were Properly Refused

(Answering Appellants' Point 2, Brief 46-47, 58-60)

Appellants argue that the court erred in refusing to give their requested instructions 23 and 27. No

exception was taken in the trial court to the refusal of request 23. Tr. 2804-2810. Having entirely failed to except, appellants cannot now assign error to the refusal of the requested instruction. Rule 51, F.R.Civ.P.; *Sears v. Southern Pacific Co.,* 313 F.2d 498 (9th Cir. 1963); *Brown v. Chapman,* 304 F.2d 149 (9th Cir. 1962); *Hargrave v. Wellman,* 276 F.2d 948 (9th Cir. 1960); *Richfield Oil Corp. v. Karseal Corp.,* 271 F.2d 709 (9th Cir. 1959), cert. den., 361 U.S. 961, 4 L.Ed.2d 543.

Request 23 was an incorrect statement of the law in any event. It read:

> "Defendants have the right to adopt and enforce rules and regulations in order to regulate, standardize, and promote competition in the sport of bowling, and such regulations are not unlawful even though an incidental effect may be to restrict the business of the plaintiff."

Such an instruction would have told the jury the defendants could lawfully adopt and enforce (against anyone, apparently) rules to regulate competition in bowling where the effect is to restrict the business of an outside competitor. But this is exactly the kind of conduct which the Sherman Act proscribes. Error may not be assigned to the refusal of a requested instruction which was inaccurate or deficient in any respect. *Alaska Pacific Salmon Co. v. Reynolds Metals Co.,* 163 F.2d 643 (2d Cir. 1947); *Southern Pac. Co. v. Souza,* 179 F.2d 691 (9th Cir. 1950); *Cherry v. Stedman,* 259 F.2d 774 (8th Cir. 1958).

Request 27 was also erroneous. It read:

> "If you find that the main purpose and chief effect of the eligibility rule and its enforcement is to foster the bowling business by the promotion of standardized rules and regulations re-

> garding participation in tournaments without any unlawful intent to monopolize or restrict trade, then even though such rules or regulations incidentally restricted competition and interstate commerce, such acts do not constitute a monopoly or attempted monopoly in violation of the antitrust statutes of the United States."

The statement that "such acts do not constitute a monopoly or attempted monopoly" is out of place and could not possibly "balance" a group boycott instruction given under Sherman Act § 1. It is well settled that a group boycott violates Section 1 regardless of whether the group has monopoly power or is engaged in an attempt to monopolize. *Eastern States Retal Lumber Dealers' Ass'n. v. United States,* 234 U.S. 600, 58 L.Ed. 1490 (1914). The District Court said of request 27:

> "Moreover, the instruction is incomplete in that it does not explain the course for the jury if the incidental effect is one that 'may be to substantially lessen competition.' This is precisely why group boycotts are illegal." R. 243; Appendix D, *infra.*

At trial defendants did not contend the instruction was correct as drawn. Defense counsel said after the charge was read:

> "27 was the request we gave relative to the effect of the eligibility rule. I don't think we got down to discussing whether the particular working of 27 was appropriate or not . . ." Tr. 2805.

Following the conference on instructions during trial (Tr. vol. 12) defendants submitted nothing further in writing. Requests 23 and 27 were properly refused.

The Special Finding on Sherman Act § 2 Independently Sustains the Verdict

The jury found defendants violated both Section 1 and Section 2 of the Sherman Act. The group boycott instructions discussed above related to Section 1, conspiracies in restraint of trade. They did not apply to Section 2, attempts and conspiracies to monopolize. The jury's specific finding on Section 2 moots appellants' argument about the boycott instructions.

The special interrogatory on Section 2, and the jury's answer, were as follows:

> "Do you find from a preponderance of the evidence that ANY of the defendants named in the second part of this interrogatory attempted, among themselves or with others, to monopolize or conspired to monopolize any part of the trade or commerce of the United States? (Section 2, Sherman Act)"
>
> "ANSWER: Yes." R.221.

The record is replete with evidence to support this finding. The overbuilding committees of the state and national associations repeatedly tried to block the sale of bowling equipment to newcomers in the field. Although defendants opposed every proposed new sale by AMF in Washington on grounds of purported economic unfeasibility, none of the new houses which got AMF equipment had gone out of business by the time of trial. Tr. 307. Only one small house in Tacoma closed although the number of lanes tripled in a few years. Ex. A-8. The overbuilding committee wrote that Spokane was "overbuilt" when it had one bowling lane per 2,000 people (Ex. 113) and that Tacoma was "overbuilt" with 1,835 people per lane (Ex. 4); yet Corbett, President of the WSBPA, himself invested money and built a

large bowling house on the basis of one lane per 1,000 population (Tr. 363). In 1959 defendants told Hoffman Pacific Lanes should not be built because there were already too many bowling alleys in Tacoma (Tr. 575), yet later that year defendant Redig began construction in Tacoma of Bowlero, a 32-lane house (Tr. 1072), and other defendants built New Frontier, another 32-lane house, after Pacific Lanes started business. Tr. 1644.

Defendants' intent to monopolize is shown clearly by the correspondence of the overbuilding committee. The following excerpts are illustrative:

In 1958 the committee chairman wrote to a fellow member regarding keeping an Eagles bowling establishment out of Walla Walla:

> ". . . I will get together with Phil Cunningham and we will go to work on the supplier over here on the managerial level and take it to higher authorities and to the BPAA if you think it is necessary." Ex. 7.

In 1959 the committee wrote to a member in Anacortes about the problem of an independent operator planning to open business there:

> "We do not require any authorization from a present member as to his plans for expansion of any existing facility . . . Where our committee does come into the picture is in a case where another installation is planned in the same area where one of our members is presently operating . . . *We think that we have been successful in some cases in eliminating or discouraging new operations* . . . However, I might point out to you that we had a call a short time ago from Mr. Manous of AMF in which he advised us that there was a party definitely interested in putting a new installation into Anacortes. We talked to him on the phone and cited population

> figures in your area and suggested that they look into the situation very seriously before accepting an order . . .*I would suggest that if you are in a position to do so that you launch your project as quickly as possible . . .*" (Emphasis added.) Ex. 26.

For several months defendant succeeded in blocking the sale of equipment to the Loveless brothers, who were trying to establish Secoma Lanes between Seattle and Tacoma. The overbuilding committee wrote to AMF:

> "We are firmly convinced that no new installations are warranted in this particular area and that the sale of any such installation would be extremely harmful to the existing operations. As a result of the intensive interest in this area, three of the present proprietors are definitely committed to enlarge their present facilities against their better judgment, but they feel that it is necessary as a form of insurance to keep from being raided by new houses . . ." Ex. 29.

When AMF and Brunswick refused to sell to Secoma Lanes, defendants wrote to AMF:

> "Now about the Loveless brothers' 24 lane house referred to in your second letter. We are very appreciative of the fact that you notified this customer that you would not be able to accept the Sjostrom order. We, in turn, are very happy to tell you that your major competitor has also turned this installation down. We have seen the letter of rejection and are in a position to notify you that this is not hearsay. The victory as far as we are concerned is academic because although the Loveless brothers will not be permitted to go ahead with their 24 lanes the district will be saddled with an additional 28 lanes by the present operators taking steps to protect their existing investment . . .*They*

feel that unless they saturate the district themselves that very shortly someone else will find ways and means of going into business in the area." (Emphasis added.) Ex. 34.

The eligibility rule's destructive power over nonmembers was part of the scheme to monopolize. Defendants used the threat of denial of membership in the association in trying to exclude others from the field. Exs. 44, 45. Secoma Lanes, after it succeeded in starting business, was kept out of the association from 1959 until early 1961. Tr. 733, 748. Aberdeen Lanes and Lacey Lanes, owned by the same management, were denied membership because of their connection with Secoma Lanes. Tr. 734-36, 746, 748. The witness Kennedy heard defendant Cunningham say, at a meeting of the P-OBPA, "I don't want Secoma admitted" to membership. Tr. 432. Mrs. Coles, a former proprietor, testified to another association meeting in late 1959 at which Cunningham said, concerning the application of Secoma Lanes for membership, to "give him three months and he would break them." Tr. 243-244, 249. Other evidence of the joint use of the overbuilding committee and the eligibility rule is summarized in the section on Interstate Commerce, *infra*.

Monopolization was part of the nationwide conspiracy. In organizing the overbuilding committee in 1957, the BPAA president referred to the need to "see if something could not be done at this meeting to try and keep our industry where it has been in the past." Ex. 1. One and one-half years later a different BPAA president referred to the problem of "every Tom, Dick and Harry, every sharpshooter, every promoter trying to get into the bowling business . . ." Ex. 22. The problem of "overbuilding"—the job of trying to keep newcomers out

of the bowling business—was attacked mainly at the local level because the BPAA decided that would be the most effective approach. Exs. 24, 18, 57.

Appellants cite *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir. 1963), which simply holds that the offense of attempting to monopolize—absent actual monopoly power—requires proof of specific intent. Here there was ample proof of the unlawful intent. Indeed, defendants have not questioned the sufficiency of this evidence at trial or upon appeal.

The court instructed the jury separately under Section 1 and Section 2:

> "As I have stated, the plaintiff contends that the defendants, together with other persons or corporations, violated one or more of the following provisions of the Sherman Act:
> "First: Section 1, which provides that any combination or conspiracy in restraint of interstate trade is unlawful; and
> "Second: Section 2, which provides that an attempt to monopolize is unlawful; or a combination or conspiracy formed to monopolize interstate trade or commerce is unlawful." Tr. 2758-2759.

The jury was instructed in detail on monopoly power, specific intent, and plaintiff's burden of proof. Tr. 2766-2770. These instructions included the following:

> "If there is power to control or dominate such market, to exclude actual or potential competitors therefrom, or to otherwise unreasonably suppress competition therein, this is sufficient to constitute monopolization under the antitrust laws . . . As I have said earlier, even if a person is unsuccessful in obtaining sufficient control over an industry to constitute full monopoly power, he may still be in violation

> of the antitrust laws, if in his efforts he is found to have a specific intent to monopolize and thereby exclude competition. *Specific intent is the conscious knowledge and desire to accomplish monopolization."* (Emphasis added.) Tr. 2768.

Under these instructions the jury specially found defendants had conspired or attempted to monopolize a part of commerce. This finding goes beyond the Section 1 finding of a combination in restraint of trade, and is apart from the group boycott instructions. That group boycotts are prohibited under Section 1 would not affect the narrow issue which the jury was charged with resolving under Section 2, that of whether defendants had consciously sought monopoly power in the Tacoma-Pierce County bowling market.

The special verdict under Section 2 thus sustains the judgment regardless of appellants' argument on the boycott instructions. Any error in those instructions would have been harmless and hence no ground for reversal. *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 3 L.Ed.2d 550 (1959). Where special findings show a party was not injured by an erroneous instruction, the claimed error is without prejudice. *Bass v. Dehner,* 103 F.2d 28 (10th Cir. 1939), cert. den., 308 U.S. 580, 84 L.Ed. 486. The rule is expressed as follows in 5A C.J.S., Appeal & Error, § 1773 (3):

> "Thus, where the jury returned its verdict on an issue with respect to which there was no error, error in instructions on other issues is harmless and will not constitute reversible error."

Here, the special verdict finding a violation of Section 2 by all defendants independently suffices to support the judgment for plaintiff.

DAMAGES

(Answering Appellants' Point 3, Brief 47, 62-73)

The Correct Period of Damages Was Used

Appellants argue that the complaint herein was filed in December, 1961, and that the damages awarded plaintiff should have been limited to those incurred up to that time. This argument was not made in the post-trial motions below (R. 227), nor was any such issue mentioned in the statement of points filed under Rule 75, F.R.Civ.P. and Rule 17 (6) of this Court. (R. 259). Where an appellant fails to include a point in the statement of points, he has not complied with Rule 75 and the court need not consider such a point later argued before it. *Watson v. Button,* 235 F. 2d 235 (9th Cir. 1956); *State Farm Mutual Auto. Ins. Co. v. Porter,* 186 F.2d 834 (9th Cir. 1951); *Western Nat. Ins. Co. v. LeClare,* 163 F.2d 337 (9th Cir. 1947). See also, *Ritchie v. Drier,* 165 F.2d 239 (D.C. Cir. 1947), cert. den., 334 U.S. 860, 92 L.Ed. 178; *Sword v. Gulf Oil Corp.,* 251 F.2d 829 (5th Cir. 1958), cert. den., 358 U.S. 825, 3 L.Ed. 2d 65.

Moreover, appellants' argument ignores the agreed pretrial order which was entered by the District Judge and which framed the issues, including the period of damages, for trial. Before trial, counsel worked in discovery proceedings with the understanding that plaintiff was alleging, and the court would try issues concerning, continuing violations of the antitrust laws to the time of trial accompanied by damages throughout the entire period involved, i.e., the three bowling seasons 1961-62, 1962-63, and 1963-64. The agreed pretrial order, drawn in the fall of 1964, included agreed facts and allegations of both sides extending far past the time of filing the

complaint and to the time of the trial in 1964. Among these was plaintiff's controverted claim that it had suffered damage of $50,000 "to date", i.e., to the time of the pretrial order. The following are excerpts from the pretrial order (emphasis added throughout):

2 (m) (agreed fact):

"On September 12, 1963, the Bowling Proprietors Association of America, Inc. . . . modified the eligibility rule of that association . . . The Washington State Bowling Proprietors Association on May 10, 1963, adopted the following rule . . ." R. 164.

3 (s) (1) (contention of plaintiff):

". . . Although the 'eligibility rules' were ostensibly modified in 1963 . . . the said agreements *are still carried out* in substance by defendants and their co-conspirators . . . the intended and actual effect of the said agreements, rules and practices *has been and is* to deprive non-member establishments of the patronage of persons who wish to engage in organized bowling . . ." R. 171.

3 (y) (contention of plaintiff):

"As a direct and proximate result of the combination and conspiracy hereinabove alleged, *plaintiff has been injured in its business to its damage, to date, in the amount of* $50,000." R. 174.

4 (f) (contention of defendants):

"The plaintiff's payments for equipment purchased from out-of-state manufacturers have increased substantially *for every year of its operation.* The plaintiff's purchase of bowling balls . . . and other items for resale from out-of-state manufacturers have substantially increased *every year since it began business.* The

plaintiff's gross income has substantially increased *every year since it began business.* The plaintiff's business is one of the very few bowling establishments in Pierce County to realize a profit *during the years* 1959 *through* 1964 . . ." R. 176.

(5) (c) (issue of fact):

". . . to what extent, if any, have the said agreements and practices of the defendants injured the plaintiff in its business?" [No time restriction is expressed in this issue of fact.] R. 181.

The stipulation to these contentions and issues made it unnecessary for plaintiff to file a supplemental complaint, which it otherwise could have done under Rule 15 (d), F.R.Civ.P. When the parties submitted an agreed pretrial order to the court setting forth their respectives contentions and the issues, they were bound thereby and the issues to be tried were those agreed upon and adopted by the court's entry of the order. Plaintiff was entitled to present evidence on the full period of damages covered by the contentions of the parties in the pretrial order. Rule 16, F.R.Civ.P.; *Fowler v. Crown-Zellerbach Corp.,* 163 F.2d 773 (9th Cir. 1947); 1A Barron & Holtzoff, Federal Practice and Procedure, § 473, pp. 844, 847; *Shell v. Strong,* 151 F.2d 909 (10th Cir. 1945); *Daitz Flying Corp. v. United States,* 4 F.R.D. 372 (E.D. N.Y. 1945).

Just before trial, despite these provisions of the pretrial order, defendants unexpectedly questioned whether plaintiff's damage proof should extend beyond December, 1961. In response to this plaintiff submitted a memorandum (R. 263) which showed that all parties had prepared to try the damages issue through the 1963-64 season. At a deposition of

Hoffman taken several months before trial plaintiff's damage claim was given as about $50,000 for the three years. R. 266. Defendants' accountant testified in his pretrial deposition that his job, done in conjunction with defense counsel, was to examine plaintiff's financial records and alleged damages to the end of the 1963-64 season. R. 266-269. Defendants prepared detailed accounting exhibits dealing with the damages issue for all three seasons, and filed a list of these before trial. R. 115, Exs. A-5, A-13, A-14, A-18, A-19.

When these facts were shown to the court, defense counsel suggested that plaintiff proceed with damages proof for the entire period and that the court could rule later. Tr. 853. Defendants never attempted to controvert plaintiff's memorandum, and submitted nothing further on the question. During Hoffman's testimony defense counsel interposed "an objection as to damages beyond December 7, 1962 [*sic*]", adding "I understand the Court previously ruled." Tr. 1141. The damages evidence was admitted without further comment.

The court instructed the jury:

> "If you find that the plaintiff did suffer injury because of the alleged violations of the defendants the plaintiff nonetheless can only recover for damages suffered between October 15, 1960, that is the date he left the Association, and the end of the 1963-4 bowling season, which ended last spring sometime. Now even though the plaintiff may have suffered injuries outside of this period it cannot recover those damages, if any, in this action, and you are directed not to assess any damages except for the period I have just stated." Tr. 2782.

Defendants did not except to this instruction (Tr.

2804-2810) and cannot contend for a different damages period at this stage of the proceedings; the instruction is the law of the case. *State Farm Mutual Auto. Ins. Co. v. Porter,* 186 F. 2d 834, 845 (9th Cir. 1950).

The policy of the federal courts is to expedite justice by disposing of an entire controversy in one action. *Mitchell v. RKO Rhode Island Corp.,* 148 F. Supp. 245 (D. Mass. 1956). Here the District Court's ruling was also required by the pretrial order. The entire conduct of the trial by defendants showed they had prepared to meet the damages issue for all three seasons. Both sides presented evidence without objection of many events which occurred in the period 1962-1964. The argument appellants now undertake is completely without merit.

Appellants May Not Question the Sufficiency of the Damages Evidence for the First Time on Appeal

At pp. 47 and 66-73 of their brief, appellants contend that the evidence of damages was insufficient to support the verdict. This marks the first time appellants have tried to raise such an issue. They made no such claim in the trial court. Appellants may not raise this argument for the first time on appeal, and it should not be considered.

Questions of sufficiency of the evidence may be raised at trial only by a proper motion for directed verdict at the close of the evidence. *Oslund v. State Farm Mutual Auto. Ins. Co.* 242 F. 2d 813 (9th Cir. 1957); *United States v. City of Jacksonville,* 257 F. 2d 330 (8th Cir. 1958). Rule 50 (a), F.R.Civ.P., requires that "A motion for a directed verdict shall state the specific grounds therefor." Where no motion for directed verdict is made—or where one is

made, but the grounds are not specifically stated—nothing is perserved for appeal and no issue as to sufficiency of the evidence is before the appellate court. *Virginia-Carolina Tie & Wood Co. v. Dunbar,* 106 F. 2d 383 (4th Cir. 1939); *Lightfoot v. Weis,* 213 F. 2d 847 (5th Cir. 1954); *Capital Transportation Co. v. Compton,* 187 F. 2d 844 (8th Cir. 1951), cert. den. 368 U.S. 999, 7 L.Ed. 2d 537; 2B Barron & Holtzoff, Federal Practice and Procedure § 1073.

In *Grant v. United States,* 291 F. 2d 746 (9th Cir. 1961) this Court held at p. 748:

> ". . . The very purpose of such a rule is to enable the court to consider it below—to prevent error—to avoid appeal. *The insufficiency of the evidence, not having been raised below, cannot be raised for the first time on appeal.* Cellino v. United States, 9 Cir., 1960, 276 F. 2d 941; Wayne v. United States, 8 Cir., 1943, 138 F. 2d 1, certiorari denied 320 U.S. 800, 64 S.Ct. 429, 88 L.Ed. 483; Silva v. United States, 9 Cir., 1929, 35 F.2d 598, rehearing denied 38 F. 2d 465, certiorari denied 281 U.S. 751, 50 S.Ct. 354, 74 L.Ed. 1162." (Emphasis added.)

The motion must state the specific ground which the party later seeks to argue on appeal. Where a motion for directed verdict attacks one element of proof, but not the element later argued on appeal, the latter has not been preserved for review and is not before the appellate court. *Stilwell v. Hertz Driveurself Stations, Inc.,* 174 F. 2d 714, 715 (3rd Cir. 1949); *Friedman v. Decatur Corp.,* 135 F. 2d 812 (D.C. Cir. 1943); *Randolph v. Employers Mutual Liab. Ins. Co. of Wis.,* 260 F. 2d 461 (8th Cir. 1958), cert. den. 359 U.S. 909, 3 L.Ed. 2d 573.

In the present case, appellants moved for a directed verdict solely on the ground that the evidence

did not slow defendants' activities had sufficient effect on interstate commerce. They stated their motion at the end of plaintiff's case and renewed it at the end of all the evidence. Tr. 1228-1237, 2540-2541. The only ground mentioned was "a question of whether interstate commerce is involved here" (Tr. 1232), and that commerce "was not substantially affected" (Tr. 2541).

After trial, defendants filed a written "motion for judgment notwithstanding the verdict of the jury, or, in, the alternative, for a new trial." R. 227. Grounds 1, 10 and 13 of the written motion were the only ones based on claimed insufficiency of the evidence; these merely reiterated defendants' arguments about interstate commerce. Thus in reviewing defendants' motion after trial under Rule 50(b), the court considered and decided the only question raised, that of whether the interstate commerce evidence was sufficient. R. 232-235; Appendix D, *infra*.

Although given three opportunities—at the close of plaintiff's evidence, at the close of all the evidence, and in the post-trial arguments—to raise any ground they wished, appellants never raised any damages issue. The trial court was given no hint that they thought the damages evidence insufficient. Appellants have disregarded Rule 50(a) and may not raise the damages issue for the first time on this appeal.

The Jury's Findings on Damages Were Amply Supported by the Evidence

Even if the question were reached, the evidence was more than sufficient to support the special findings on damages. In antitrust cases, once the jury finds that plaintiff was injured by defendants'

violations of the law, it may establish the amount of damages by estimate even though the result is only approximate. In showing the *fact* of damage "plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue." *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 391 (9th Cir. 1957), cert. den., 355 U.S. 835, 2 L.Ed.2d 46. But the fact of damage, like any other fact, may be established as a matter of just and reasonable inference from the evidence. *Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264, 90 L.Ed. 652, 660 (1946).

See also, on proof of the fact of damage in antitrust actions, *Simpson v. Union Oil Co. of Calif.,* 337 U. S. 13, 12 L.Ed.2d 98 (1964), reh. den., 377 U.S. 949, 12 L.Ed. 2d 313; *Becken Co. v. Gemex Corp.,* 272 F.2d 1 (7th Cir. 1959), cert. den., 362 U.S. 962, 4 L.Ed.2d 876.

The *amount* of damages in antitrust cases is necessarily imprecise. But "justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc., supra,* at 265. The jury may thus fix the amount of damages by estimate. *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 71 L.Ed. 684 (1926); *Story Parchment Co. v. Patterson Parchment Co.,* 282 U.S. 555, 75 L.Ed. 544 (1931).

Evidence of the amount of damages can be sufficient even though circumstantial, *Eastman Kodak Co., supra,* and estimated future profits may be shown by opinion testimony, although such testimony is not necessary and the jury is entitled to determine the damages from the raw data before it, *William H. Rankin Co. v. Associated Bill Posters,*

42 F.2d 152, 155-56 (2nd Cir. 1930). Plaintiff is not confined to one particular type of injury, but may recover for all types of injuries resulting from the unlawful conspiracy or monopoly. *Flintkote Co. v. Lysfjord, supra.* Nor is plaintiff limited to any particular formula for the establishment of damages, *William H. Rankin Co. v. Associated Bill Posters, supra.*

Among the approved methods of estimating damages are the comparison of plaintiff's profits during the time it was injured by the antitrust violations with those it earned previously, *Eastman Kodak Co. v. Southern Photo Materials Co., supra,* and the comparison of plaintiff's sales and revenues with those of comparable competitors who were not injured by the violations. *Richfield Oil Corp. v. Karseal Corp.,* 271 F.2d 709 (9th Cir. 1959), cert. den., 361 U.S. 961, 4 L.Ed.2d 543; *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.,* 194 F.2d 846 (8th Cir. 1952), cert. den., 343 U.S. 942, 96 L.Ed. 1348; *North Texas Producers Ass'n v. Young,* 308 F.2d 235 (5th Cir. 1962), cert. den., 372 U.S. 929, 9 L.Ed.2d 733.

Fact of Damage

After opening in 1959 Pacific Lanes did well enough to add twelve lanes, making a total of 36, in the summer of 1960. At that time Pacific was still in the association. It left the association in the fall of 1960 and has been independent ever since. During that time there has been no other large independent house in Tacoma. Tr. 1123, 1126, 1130.

Hoffman testified:

"Q. What if anything happened in your business at Pacific Lanes after you withdrew from the Association?

"A. The balance of the 1960-1961 season, the bowlers were permitted to shoot in tournaments because they had started bowling the season at our house while we were in good standing with the BPA.
At the end of the 1960-1961 season we had leagues that pulled out and moved to other houses because of the eligibility rule.

"Q. Now generally speaking what has been the pattern of your business since that time?

"A. Since that time our business has decreased each year." Tr. 1127.

Hoffman also testified the eligibility rule "has hurt us considerably . . . it certainly keeps bowlers from bowling in leagues at our house." Tr. 1193.

The losses suffered by Pacific went far beyond the bowlers directly interested in tournaments and included whole teams of bowlers. Tr. 2457-8.

Many bowlers testified that they stopped bowling at Pacific and took their business elsewhere because of the eligibility rule. Some took their teams or friends with them. Among the bowlers who so testified were Kleinsasser (Tr. 715); Williams (Tr. 725-6); Doepke (Tr. 542); Pagel (Tr. 766-69); Jowett (Tr. 652); Mrs. Williams (Tr. 779); Garrison (Tr. 660); Marano (Tr. 484); Mrs. Athow (Tr. 531-34); Ehly (Tr. 517-23, 531-34); and Olson (Tr. 638-41).

Income from particular leagues and tournaments was taken from plaintiff by the conspiracy. Leagues moved out which were satisfied with Pacific and would have remained but for the eligibility rule:

(1) In 1960, while in the association, Pacific was the site of the annual City Association Tournament. The tournament was the largest Tacoma had yet had, involving 592 teams and about 3,000 bowlers. Tr. 93. The following year, 1961, Pacific, as an in-

dependent house, submitted a bid on the City Tournament and was awarded it. Tr. 1190. Defendants made every effort to use the eligility rule to destroy the tournament. Tr. 648, 672-73, 550-63. Stowe, the secretary of the City Association, testified that as a result of this the City Tournament, in its second year at Pacific, dropped to about 350 teams (about 1,750 bowlers). A year later, in 1962, the tournament was held elsewhere and participation went up again. Tr. 93-101. The bowling lines lost in the 1961 City Tournament because of the conspirators' activities amounted to 6,546. Tr. 1136, Ex. 259.

(2) The Invitational League was a league of high-average bowlers formed by plaintiff. It bowled at Pacific in 1960-61 and attracted many spectators. Tr. 972, 466. It was going to return the following season but the members at a meeting decided not to because the eligibility rule would ban them from tournaments. Tr. 974, 980-81, 638-41. Defendant Tadich told the meeting if they continued bowling at Pacific "they wouldn't be shooting in any tournaments," and the league disbanded. Tr. 461-64. Efforts to revive the league in 1963-64 were futile. Tr. 466-67.

(3) The Women's Invitational League was organized, had more than enough bowlers, elected a secretary, and was prepared to bowl in 1961-62 on the same nights as the men's Invitational. It broke up for the same reason and the bowlers went to New Frontier and started a different league. Tr. 981-82, 1000, 1161-62.

(4) The Tacoma Commercial League bowled at Pacific in 1959-60. Kleinsasser, its secretary, testified that after the eligibility rule problem arose the league voted to leave Pacific because of it, and that

all the bowlers were otherwise satisfied with Pacific. Six of the teams moved to Villa Lanes, and the league broke up. Tr. 713-714. (Kleinsasser mistakenly said the move was made at the end of the 1959-60 season; in fact it was made at the end of the following season when Pacific was out of the association, as indicated on the damages summary, Exhibit 259.)

(5) The Plywood League was formed originally by Stevenson. Tr. 1180. Krick, secretary of the league, instigated its removal from Pacific at the end of the 1961-62 season because of the eligibility rule; the bowlers voted to change to New Frontier, and the entire league moved. There was no other reason for the change. Tr. 509-511. At the time the Plywood League left, Stevenson was still a part owner and operator of Pacific Lanes. Tr. 1180.

(6) The Olympic League bowled at Pacific through the 1962-63 season, in which Ehly was president of the league. Just before the following season, Ehly said he would not continue at Pacific because he wanted to become eligible for tournaments. When Ehly took this stand the result was that the league voted to disband. Tr. 521-522.

None of these leagues was replaced except the Tacoma Commercial League in the one season of 1963-64, and Pacific continued to have the available time in which they could have bowled. Tr. 1131. Nor were the times filled by open play, and the house continued to have lanes available for open play every day. Tr. 1198.

Plaintiff was impaired in all three years in its efforts to form leagues and keep the trade of league bowlers. Potential customers knew of the eligibility rule and "a great number" refused to patronize the house. Tr. 1196-97, 679, 705, 709.

Not a single league has moved into Pacific since it became a non-member. Tr. 455. When Lakewood Lanes burned down none of its leagues went to Pacific even though the two houses were only about 5½ miles apart by freeway. Tr. 1147.

The general turnover in league personnel from year to year is about 30 percent in both day and night leagues. Tr. 1015. Against this, Pacific had a drop-out rate of 80 percent in the Bank of California League in the season just past, encountered "similar experiences, but not that drastic" in other leagues, and had an over-all league drop-out rate of about 50 per cent each year. Tr. 1149, 1456-2457.

The effect of the eligibility rule is just as hard on the day leagues as on the night leagues. Tr. 1186. The Tacoma Traveling League now bowls at all of the modern houses in Tacoma except Pacific. Tr. 468. Since leaving the association plaintiff has been unable to run a successful tournament. Tr. 1129-1130.

Open play as well as league play was lost by plaintiff. League play carries open play with it. Tr. 1149, 973. Bowlers like to do their open and practice bowling at the same place they bowl in competition. Tr. 718, 1149.

Pacific's total bowling revenues declined in each of the three seasons involved. Tr. 1904. Appellants argue that its open play receipts increased and that plaintiff therefore lost no open play. Br. 68. This does not follow; plaintiff still lost the open play of those customers whose league business was driven elsewhere.

Because of the eligibility rule plaintiff could not get an AMF staff exhibition bowler into the house, and was unable to get a professional tournament. Tr. 988-989, 992. Having a "name" bowler as an

employee would help bring in people to take lessons, but plaintiff could not hire one because of the eligibility rule provision barring employees of non-member houses. Tr. 1148, 1166, 2393.

The fact of damage was corroborated by evidence of injury to other independent establishments which lost business ranging from ten percent to half of their volume because of the eligibility rule: Secoma Lanes (Tr. 750-51), Burien Bowl (Tr. 792-93), and Consolidated Bowling Corporation (Tr. 1083-95).

The court instructed clearly that plaintiff had the burden of proving the antitrust violations, if any, had caused it actual financial loss. Tr. 2757, 2758, 2778. The jury returned the following special verdict:

> "Do you find, from a preponderance of the evidence, that the acts of one or more of the defendants caused financial loss to the plaintiff's business or property?
> "ANSWER: Yes." R. 223.

There is substantial evidence to support this finding and the jury's verdict must therefore stand. *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709 (9th Cir. 1959) cert. den. 361 U.S. 961, 4 L.Ed.2d 543.

Amount of Damages

As summarized above, plaintiff proved the conspiracy caused it to lose the business of the Invitational League, the Women's Invitational League, the Tacoma Commercial League, the Plywood League, the Olympic League, and part of the 1961 City Tournament, and to suffer, in addition, loss of individual bowlers, teams, open play, and day leagues. In computing the amount of damages, plaintiff listed separately the income lost from each specific league, and then added to it an approximation of

the additional loss, which, by its nature, could not be measured with precision. As to the particular leagues, damage was claimed only as to those whose places were not filled with other league business. Tr. 1131. For this reason the Tacoma Commercial League loss was shown only for 1962-63, not for 1963-64, since in the latter season its time slot had been filled by another league. Tr. 1198. Once a league was lost, however, it could not be recovered, as shown by plaintiff's experience with the Invitational League. Tr. 466-67.

The net amounts lost on the City Tournament and existing leagues in the 1961-62, 1962-63 and 1963-64 seasons were: $4,040.77 in the first season, $6,427.40 in the second, and $7,043.14 in the third, totaling $17,611.31. Ex. 259.

Beyond this, plaintiff lost numerous teams, open play, and tournament play. Tr. 1143. Hoffman gave his conservative estimate of this loss as two lines of bowling per alley bed per day. Tr. 1143, 1146. The estimate was based on his own knowledge of the business and the bowlers:

"Q. In making your computation, or in making your approximation of that loss, have you taken into account contact you have had with bowlers over the years?

"A. Yes, I have. We have been in business five years and know hundreds of bowlers and have talked to lots of them from time to time.

"Q. Any idea of about how many you have talked to about this matter over the years?

"A. It would run into the thousands, I think." Tr. 1197.

This estimate was competent and admissible. *William H. Rankin Co. v. Associated Bill Posters, supra.* The additional loss for the three seasons at

two lines per day amounted to $32,503.68, making a total of loss of $50,114.99. Tr. 1143, Ex. 259.

Fisher, an independent certified public accountant, worked with Hoffman in computing the net loss and preparing Exhibit 259. Tr. 1131, 1143. He verified the rate per bowling line charged, the bowling income from each loss item, the other income from merchandise sales, refreshment sales, and the like which the lost bowling business would have carried with it, the total gross income, the variable expenses which should be deducted from the gross income, and the net loss of $50,114.99. Tr. 1216-21. Fisher also verified that there was time open at Pacific for the lost leagues to bowl had they remained. Tr. 1212, 1220.

Rich, one of defendants' accountants, examined plaintiff's records, analyzed the figures used by Fisher, and concluded Fisher's expense figures were correct. Tr. 1324-25, 1410, 1413, 1423. He said that on two nights the Tacoma Commercial League and the Invitational League could cause Pacific to be overfilled by four to six lanes. Tr. 1371-72. But these involved the new leagues as to which Fisher testified "in one or two instances these were formed later in the season in these time spots, but there were other times available and they could just as well have gone into those time spots." Tr. 1220. Rich agreed that if the Pacific in fact lost two lines per day in addition to the particular leagues listed its loss would be $50,144.99. Tr. 1417-18.

A chart of the damages computed per plaintiff's evidence of lost leagues and other income is at Appendix B, *infra*.

But plaintiff's case in chief did not provide the only evidence of the amount of damages. Defendants' evidence supplied additional support for the

jury's finding by the often-used method of comparing the plaintiff's business and revenues with those of competitors not affected by the conspiracy. *Richfield Oil Corp. v. Karseal Corp.,* 271 F.2d 709 (9th Cir. 1959), cert. den., 361 U.S. 961, 4 L.Ed.2d 543; *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.,* 194 F.2d 846 (8th Cir. 1952), cert. den., 343 U.S. 942, 96 L.Ed. 1348; *North Texas Producers Ass'n v. Young,* 308 F.2d 235 (5th Cir. 1962), cert. den., 372 U.S. 929, 9 L.Ed.2d 733.

Defendants' experts were Ford and Rich, certified public accountants, and Professor North, an economist. Ford and Rich made an extensive study of ten of the approximately twenty bowling alleys in the Tacoma area. They took the income, expense and investment figures of the houses and adjusted them to eliminate accounting differences and to place all ten on the same accounting basis. Tr. 1264, 1267, 1362-64.

On the basis of this study defendants introduced voluminous testimony and foundation exhibits purporting to compare plaintiff's experience to that of the "industry sample." The "sample," however, was meaningless because it included seven older houses which were admittedly not comparable to Pacific Lanes, Tr. 1314-1315, 1408, 1464, 1920, and the industry figures showed a steady decline of business in the older houses and a shift to the newer ones. Tr. 1316, 1468, 2511.

The only comparable houses were the three large new ones: Pacific (built in 1959), Bowlero (1960) and New Frontier (1961). The witnesses for both sides agreed to this. Tr. 1128, 1168, 1315, 1464, 1478. North testified these three houses were the only ones that could be profitable. Tr. 1939. Rich found them "the most comparable." Tr. 1315.

Even among these three, there was evidence that Pacific Lanes had the best location and was superior in other respects. Tr. 1128, 947-49, 956, 320-21, 466, 105. Moreover, Pacific is 12½ per cent larger than Bowlero and New Frontier, and defendants' graphs and statistics made no allowance for this difference. Tr. 1483, 1501-1502, 1899-1902.

Nonetheless, comparison of the three demonstrated the injury to plaintiff and evidenced an amount of damages almost identical to that found by the jury. The first year in which all three houses were in existence was 1961. Tr. 1408-1409, 1479, 1971. True comparisons could therefore be made only for the calendar years 1961, 1962 and 1963. These showed that Pacific spent the most for advertising and promotion, from half again to twice as much as the other two, in all three years, but, in 1963 and at the time of trial, had the fewest night leagues, the fewest day leagues, and the fewest total leagues of the three. Tr. 1485, 1502. *Revenues of the two defendant houses went up each year while plaintiff's revenues went down each year.* Tr. 1904. Bowlero's income increased more markedly from 1961 to 1962 because of a $25,000 tournament held in 1962, and in 1963, without the tournament, still surpassed the figure for 1961. New Frontier increased each year. Tr. 1507, 2492.

Plaintiff was also the only one of the three bowling alleys that declined in bowling lineage, as well as dollars, in all three years. Tr. 1469-1470, 1489-1490.

Defendants' exhibits A-49, A-50 and A-51 showed the amounts "returned to owner from bowling operations" for the three houses. The figures represent the amounts received from bowling operations less actual expenses and less a standard amount for

pinsetter rental, building rental and depreciation. Tr. 1333-34, 1492-93. Ford testified that "return to owner" meant net income corrected to standardize the factors of interest on indebtedness and owner's salary. Tr. 1493. For the years 1961 through 1963, defendants' figures showed the following amounts returned to the owners: Bowlero $119,486, New Frontier $63,948, Pacific $55,296. Exhibits A-49, A-50, A-51; Tr. 1983-86. Plaintiff was thus the lowest in this category, even though the largest of the three. It was about $65,000 lower than Bowlero, a comparable house. The total for Bowlero and New Frontier was $183,434, or an average of $91,717. *This meant that plaintiff's standardized net income was* $36,421 *below the average of the other two.* Tr. 1986-88.

A chart of the damages based on comparative net income is at Appendix B, *infra.*

Defendants argued at trial (Exhibit A-75) and now reiterate (Br. 45) that if Pacific were awarded its claimed damages of $50,000 it would have earned much more than the next highest house. But in making this argument they use the misleading tactic of including the year 1960, and thereby measuring four years of plaintiff's revenues against three years of New Frontier's and three and a fraction years of Bowlero's. Although 1961 was the first year when all three houses operated, defendants' graphs commenced with January, 1960. Tr. 1408-1409, 1479, 1971. When the proper comparison of the three-year period was made, the result was that Bowlero's "return to owner" would be the largest even if the entire claimed damages of $50,000 were added to Pacific's total. Tr. 2495, 1995-96.

There was still a third method of computing the

amount of plaintiff's damages: through comparison of bowling lineage, rather than dollars. Fisher used the figures introduced by defendants' experts to prepare Exhibit 265, which charts the lines per alley bed for 1961-63 of Pacific and the average of the three comparable houses. After 1961 (Pacific's bowlers became ineligible for tournaments at the end of the 1960-61 season) plaintiff's lineage dropped each year. The average of the three houses —even weighted down by Pacific's decline—increased sharply in 1962 and in 1963 was again above the 1961 level. If Pacific had followed the three-house average—that is, if its bowling lineage commencing with the starting point of 1961 had kept pace with the three-house average—it would have had 86,646 more lines than it actually had in 1962, and 43,734 more in 1963. The total lineage lost by this measurement for the *two* seasons was 130,380. The total lineage lost as computed on Exhibit 259, plaintiff's summary exhibit, was 118,290 for the *three* seasons. Thus, by comparing Pacific's actual volume to the lineage it would have had by retaining its initial ratio to the three-house average the loss is shown to be greater in only two years than the loss plaintiff claimed for all three years. Tr. 2500-2503.

A chart of this method of computing the damages is at Appendix B, *infra*.

The court instructed the jury that "in determining the amount of damage, if any, you may not engage in guesswork or speculation." Tr. 2781. The jury returned the following special verdict:

> "What is the amount of loss which you find the plaintiff's business or property has suffered because of the acts of the defendants?
>
> "ANSWER: $35,000." R. 223.

There was substantial evidence to support this finding, and it must stand. *Flintkote Co. v. Lysfjord, supra,* relied on by appellants, is not controlling. In that case there were no data on which the jury could base its estimate, no business history, and no comparison with a competitor. 264 F. 2d at 391-394. None of these deficiencies is present here. Plaintiff sought no future profits, but only compensation for three past seasons in which it was clearly injured. There was strong evidence of loss of specific blocks of business and of further losses which were approximated on the basis of extensive experience in the industry. The figures were supported by comparison with the revenues of the only two comparable competitors. The evidence is well within the requirements established by this Court in *Richfield Oil Corp. v Karseal Corp.,* 271 F. 2d 709, 713-15, equating "the just and reasonable estimate of damage to the just and reasonable verdict the jury must render in a personal injury case." When the jury is properly instructed as here, its determination of the amount of damages is conclusive. *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 379, 71 L. Ed. 684, 691.

INTERSTATE COMMERCE

(Answering Appellants' Points 4 and 5, Br. 47-48, 74-102)

Here again appellants attempt to re-argue a fact issue which was decided adversely to them in the trial court. The question of whether a conspiracy restrains or affects interstate commerce so as to invoke federal antitrust jurisdiction is for the jury under proper instructions. *Marks Food Corp. v. Barbara Ann Baking Co.,* 274 F. 2d 934 (9th Cir. 1960); *Sunkisk Growers, Inc. v. Winckler & Smith Citrus*

Prod. Co., 284 F. 2d 1, 24 (9th Cir. 1960), rev'd on other grds., 370 U.S. 19, 8 L. Ed. 2d 305; reh. den. 370 U.S. 965, 8 L. Ed. 834.

Congress, in passing the Sherman Act, "left no area of its constitutional power unoccupied." *United States v. Frankfort Distilleries,* 324 U.S. 293, 89 L. Ed. 951 (1945). It exercised its full power over interstate commerce, so that the Act extends both to transactions in the stream of commerce and to local transactions which substantially affect interstate commerce. *United States v. Employing Plasters Ass'n.,* 347 U.S. 186, 98L.Ed. 618 (1954); *United States v. Women's Sports Wear Manufacturers Ass'n.,* 336 U.S. 460, 93 L.Ed. 805 (1949). Whether intrastate activities affect interstate commerce "is a question of fact." *Las Vegas Merchant Plumbers Ass'n. v. United States,* 210 F. 2d 732 (9th Cir. 1954), cert. den., 348 U.S. 817, 99 L.Ed. 645.

One injured by a conspiracy which affects commerce may recover treble damages even though he is not directly involved in the interstate commerce which has been affected. *Mandeville Island Farms, Inc. v. Amercian Crystal Sugar Co.,* 334 U.S. 219, 92 L.Ed. 1328 (1948). Thus, the plaintiff need not be himself engaged in interstate commerce at all; he has standing if injured by a conspiracy which, in one or more of its aspects, affects commerce. *Bailian Ice Cream Co. v. Arden Farms Co.,* 104 F. Supp. 796 (S.D. Cal. 1952), aff'd, 231 F. 2d 356 (9th Cir. 1955), cert. den., 350 U.S. 991, 100 L.Ed. 856.

A qualitative, rather than a quantitative, test is applied in determining whether interstate commerce has been substantially affected. *Las Vegas Merchant Plumbers Ass'n. v. United States, supra.* The test is not the quantity involved, nor a diminution of the total trade, but only whether the conduct

alleged has a substantial effect on some part of interstate commerce. *Fashion Originators Guild, Inc. v. Federal Trade Comm'n.,* 312 U.S. 457, 85 L.Ed. 949 (1941); *United States v. Women's Sportswear Manufacturers Ass'n.,* 336 U.S. 460, 93 L.Ed. 805 (1949).

The trial court here instructed the jury that the burden was on plaintiff to prove the alleged violations substantially affected commerce; that the operation of a bowling alley, without more, is an intrastate activity, but that local businesses making substantial use of the channels of interstate commerce assume an interstate aspect; and that the amount of commerce affected must be "more than insignificant." Tr. 2775-77.

Effects on Interstate Commerce Portion of Plaintiff's Business

Under these instructions the jury returned two special verdicts finding that the conspiracy substantially affected interstate commerce. The evidence was clear, *supra,* that bowling is a large industry involving millions of dollars in transactions, including interstate transactions, each year. The minimum equipment rental payments made by Washington State customers to AMF in New York each year exceed one million dollars, and AMF represents only about half of the market. Tr. 271-273. AMF's business fluctuates with the number of bowling lanes in operation and the volume of business done by each proprietor who leases pinspotting equipment. Tr. 274. The first special verdict of the jury on interstate commerce relates to this aspect of the industry. The evidence showed that the loss of bowling lineage inflicted on Pacific Lanes by the conspiracy caused it to pay $9,000 less than it normally would have paid for pinsetter rental to AMF in New

York over the three seasons involved. Tr. 1200-1201. The jury returned the following finding:

> "Do you find, from a preponderance of the evidence, that the acts of the defendants substantially affected the interstate commerce portion of the plaintiff's business, and that this portion affected was also more than an insignificant or insubstantial amount?
>
> "ANSWER: Yes." R. 223.

Whether plaintiff's interstate payments were significant or not was a jury question, and the verdict based on this evidence concludes the issue. *Marks Food Corp. v. Barbara Ann Baking Co., supra; Richfield Oil Corp. v. Karseal Corp., supra.* This finding suffices to support Sherman Act jurisdiction. Almost exactly in point is *United States v. Central States Theatre Corp.,* 187 F. Supp 114, footnote 19 (D. Neb. 1960) where interstate commerce was held sufficiently affected by restraints upon a drive-in movie theatre, since the film rental payments made by the theatre depended directly on the admission charges paid by local customers. As here, a restraint which diminished the admission receipts also reduced the interstate rental payments.

Other Effects of Conspiracy on Commerce

The second interrogatory on this subject concerned the effect of defendants' conspiracy on interstate commerce in general. In arguing this issue appellants, like the defendants in *Jerrold Electronics Corp. v. Wescoast Broadcasting Co.,* 341 F. 2d 653, 663 (9th Cir. 1965), seek to discuss separately each of their acts and argue that it alone does not support the verdict. As in *Jerrold,* this approach fails to cope with what really happened; here, that businessmen controlling most of an in-

dustry combined to restrain and monopolize the entire field. Theirs was a multi-purpose conspiracy which embraced concerted refusals to deal, price maintenance, allocation of markets, and monopolization, and the conspiracy as a whole restrained commerce. Defendants argue as if plaintiff's lost customers must have been interstate travelers for the antitrust laws to apply; such is not the law, as shown by the numerous motion picture exhibitors' cases and others in which plaintiffs have recovered damages for loss of local patronage.

Eligibility Rule

The eligibility rule was one aspect of the conspiracy which directly restrained commerce. Because of it the business of non-member houses other than plaintiff dropped drastically. Tr. 750-51, 792-93, 1083-1095. These declines necessarily reduced the volume of interstate purchases and rentals, and illustrate the rule's effect on non-member houses.

The bowling tournaments themselves are part of interstate commerce. Some are broadcast by interstate television and radio. Tr. 137-138, 147-149, Ex. 261e. Many nationwide tournaments involve state and regional preliminaries. Tr. 143-155.

Bowlers in substantial numbers travel across state and international lines to participate in tournaments, and this commerce was restrained by the conspiracy.

The WSBPA and BPAA gave the Canadian proprietors a series of "deadlines" to join or have their bowlers banned from tournaments in Washington. Exs. 112, 114. When the Canadians did not join by July 1, 1961, their bowlers were declared ineligible. Exs. 133, 134. In the face of this they joined effective January, 1962. Exs. 136, 137, 138.

Many Canadians came into Washington to bowl in tournaments. Grant, manager of Consolidated Bowling Corporation's three large bowling alleys in British Columbia, testified that he personally had seen Canadians in U. S. tournaments numbering "in the thousands." Tr. 1098. Consolidated had 7,242 registered league bowlers in its houses, of whom approximately 20 per cent normally traveled to Washington for tournaments. Tr. 1085-1086. In 1962, 986 bowlers from Vancouver, B.C. alone bowled in the All-Coast Tournament at Vancouver, Washington. Tr. 1087.

Consolidated left the BPA in 1963, and its bowlers became ineligible for U. S. tournaments. Tr. 1091-1092. Grant testified that the eligibility rule affected the traffic of bowlers to the United States, that it is "considerably down," and that bowlers from Consolidated's houses have been rejected from tournaments in this country. Tr. 1097.

Appellants argue that Grant's testimony was inadmissible because it was based in part on records kept by others. But the witness showed extensive personal knowledge as a proprietor (Tr. 1082), as a tournament bowler who had bowled all over the United States (Tr. 1084), and as a former secretary of the City Bowlers Association (Tr. 1103). He based his testimony on his knowledge of his own business, on books and records of Consolidated kept by himself, on his own observation of bowlers, and on records of the City Bowlers Association. Tr. 1084, 1090, 1098. The testimony was admissible under the rule expressed in McCormick on Evidence, § 10 (1954 Ed.), p. 20:

> "And in business or scientific matters when the witness testifies to facts that he knows partly at first hand and partly from reports, the judge, it seems, should admit or exclude

according to his view of the need for and the reasonable reliability of the evidence."

Accord: *Hunt v. Stimson,* 23 F. 2d 447 (3rd Cir. 1928).

Moreover, the only statistic which Grant said came from the City Association records was that there were 5,500 Canadian entries per year in U. S. tournaments. Tr. 1098-1107. The most important part of his testimony—that about 20% of Consolidated's 7,242 league bowlers go to tournaments in Washington—was "a figure derived from our own houses." Tr. 1107-1108. As plaintiff stated in argument (Tr. 2703), this meant that about 1,500 people who would ordinarily cross the border yearly to bowl in tournaments are now barred by the eligibility rule from doing so.

Similar jurisdictional facts were proved by other witnesses whose testimony was not objected to. In 1963 the All-Coast Tournament at Vancouver, Wash., attracted 7,000 bowlers, about 135 to 140 of whom were from Canada. Tr. 2304, 2306. This was in a year when most of the Canadians were disqualified by the eligibility rule. Many fewer Canadians came into Washington for the tournament than in 1960, when Grant said there were 986 from Vancouver alone. Tr. 1087. Beyond this, of the 7,000 bowlers, about 60 per cent, or 4,200 people, came from outside Washington. Tr. 2315. The eligibility rule appeared on the tournament posters and entry blanks, and there was no way to tell how many people stayed away from the tournament who would otherwise have come. Tr. 2316. In the Crosley Mixed Team Tournament in 1964, about a thousand bowlers took part, of whom about 600 came from outside Washington. Tr. 2317-2318.

In all of these situations, the conspiracy not only

reduced the number of bowlers traveling in commerce, but also imposed a *qualitative* restraint: only those bowlers traveled to take part in tournaments who boycotted independent bowling alleys in their home states and elsewhere.

Price Fixing

The court instructed that price fixing violates the Sherman Act only if it affects interstate commerce. Tr. 2774. Not only the fixing of prices at agreed levels is unlawful. Any combination whose purpose and effect is to raise, depress or *stabilize* prices is illegal per se. *United States v. Parke Davis & Co.,* 362 U.S. 29, 4 L.Ed. 2d 505 (1960); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 84 L.Ed. 1129 (1940).

Price stabilization was clearly one aim of defendants' conspiracy here. At the 1957 meeting where the overbuilding committee was formed, the BPAA President spoke of the danger of "price wars upon price wars, and I think the only people in this room who have any control over it are sitting here at this table." Ex. 1. Another BPAA President wrote in the official magazine in 1959:

> "There is no room anywhere in the fabric of proprietor organization for unethical practices, price cutting or under-the-table deals for temporary personal advantage." Ex. 261c.

See also Exs. 22, 51, 65, 74.

In Washington, defendants combined to keep prices where they wanted them. So-called "unfair pricing" was a concern of the overbuilding committee. Tr. 1652, Exs. 31, 35. Price increases were discussed at association meetings. Tr. 2204, 238, 241, 261. Applicants for membership were asked to bring

their prices to the level charged by members. Tr. 235, 422-29. Defendants had a "gentlemen's agreement" to hold prices. Tr. 318-19. Schedules of league prices were adopted at meetings. Tr. 962, 1117-19, 1121. Tacoma prices were generally uniform about two years, beginning about 1960. Tr. 258-59, 1008. The Southwest Washington BPA Code of Ethics fixed prices for spare practice at $1.00 per man. Ex. 262.

Appellants argue that Exhibit 262 was not binding on them. But the SWBPA documents were delivered by an association representative with the WSBPA application form and code of ethics; defendant Kulm was an officer of both WSBPA and SWBPA and knew of the latter's express price-fixing provision; and the exhibit was admitted without objection and without restriction. Tr. 798, 2265-66.

Appellants also argue that the testimony of Hoffman and Stevenson was incompetent. The short answer to this is that appellants made no objection to the testimony below and cannot now argue that it should have been excluded. *Williams v. Union Pacific R.R.,* 286 F. 2d 50 (9th Cir. 1960). Moreover, appellants rely on the doctrine of *in pari delicto,* which does not apply in antitrust cases. *Keifer-Stewart v. Jos. Seagram & Sons,* 340 U.S. 211, 95 L.Ed. 219 (1951). Even the testimony of a co-conspirator is competent. *Pittsburgh Plate Glass Co. v. United States,* 260 F. 2d 397 (4th Cir. 1958) *aff'd.,* 360 U.S. 395, 3 L.Ed. 2d 1323 (1959); *Colt v. United States,* 160 F. 2d 650 (5th Cir. 1947). And here essentially the same facts were proved by other witnesses.

Trade associations like the BPAA are interstate instrumentalities even though they are not "en-

gaged in any commerce in the sense of being a trader or shipper . . ." *Chamber of Commerce of Minneapolis v. Federal Trade Comm'n.*, 13 F. 2d 673 (8th Cir. 1926); *Quality Bakers of Amer. v. Federal Trade Comm'n.*, 114 F. 2d 393 (1st Cir. 1940). The use of an interstate instrumentality, or the use of local acts by a business engaged in interstate commerce, to restrain local trade violates the antitrust laws. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 99 L.Ed. 145 (1954).

Here defendants and their co-conspirators used the BPAA, an interstate instrumentality, to artificially stabilize prices and otherwise restrain the commerce of bowling alleys. This invokes jurisdiction.

"Overbuilding" Activities

Defendants make the amazing statement that the overbuilding committee "was fully in accord with the right of any person to invest in any trade or business." Br. 96. This is belied by the committee's own correspondence: "They feel that unless they saturate the district themselves that very shortly someone else will find ways and means of going into business in the area." Ex. 34. See also Exs. 7 and 26.

The overbuilding committees directly restrained commerce by preventing the construction of new bowling alleys and, hence, the interstate sales of the equipment and materials to get them started. Secoma Lanes, after the overbuilding committee wrote to AMF and Brunswick, was unable to get equipment at all for many months and was therefore unable to open as scheduled. Ex. 34, Tr. 1824-1832. A 24-lane house, Secoma's interstate outlay for lanes and pinsetters alone would have been $322,800 at the rates charged by AMF. Tr. 270-271. The

Washington committee wrote that it believed it had been "successful in some cases in eliminating or discouraging new operations." Ex. 26. See also Tr. 1627, 1682, Ex. 31.

Nationally, in 1957 the BPAA overbuilding committee asked AMF "to demand high down payments in critical areas, as determined by the BPAA listing. AMF agreed that not less than a 25 per cent down payment would be accepted, and that there would be no exceptions." Ex. 3. In 1958 the committee reported that the manufacturers "said they would stiffen credit terms and that they would tone down their proposals to new prospects . . ." Ex. 5. In 1958 it reported that AMF and Brunswick had decided to stop building for six months in the Miami area. Ex. 20. The 1959 overbuilding committee report referred to "a moratorium in Florida and a few turndowns in Detroit", while complaining about the difficulty of attaining "our goal to protect our business from price wars, boycotts, and similar evils . . ." Ex. 21.

Defendants appear to concede that their anti-"overbuilding" efforts restrained commerce, but seek to segregate their activities by arguing that "However interstate in nature the overbuilding activities may have been does not serve as the basis for inferring that the [eligibility] rule had the requisite effect on interstate commerce." Br. 102. But the evidence clearly showed that overbuilding and the eligibility rule—together with p r i c e maintenance, allocations of markets, and exclusion of competitors—were all part of the same conspiracy. Defendants' codes of ethics, Exs. 59, 264, prohibited solicitation or acceptance of business from customers of fellow members, condemned "special inducements" such as merchandise, and agreed to

reject from tournaments all persons who bowled in a league in a non-member house. Defendant Isaacson inquired of an affiliated association in 1959: "Has the Code of Ethics proved valuable in combatting the overbuilding problem?" Ex. 48. Association officials told Loveless the eligibility rule was developed to protect the proprietors, since the "overbuilding" situation could make the business not profitable. Tr. 740-741, 743.

The overbuilding committee wrote in March, 1959 about preparing written materials which members would show to anyone who expressed interest in entering the bowling business:

> "The message that we have in mind should read something like this: '. . . if a non-member is not accepted into the W.S.B.P.A., there are certain services and privileges which he will not receive . . . Eligibility to BPAA All-Star eliminations in all categories, individual, team, doubles, handicap team, etc. is available only to bowlers bowling exclusively in BPAA houses. In Washington state all members of the W.S.B.P.A. post the following message: [quoting rule requiring bowlers to do all their league bowling in member houses] . . .'
>
> *"It is the belief of your O.B.C. that only by working together and enforcing in every manner possible the rules of our association can we be effective in discouraging overcrowding of the bowling field which can easily lead to unfair pirating of leagues and employees. Overbuilding also lends itself to many other dangerous practices such as offering bonuses and premiums and other forms of unfair pricing."* Ex. 35. (Emphasis added.)

This plan was followed up by defendants, who told would-be proprietors they would be faced with adverse recommendations to the membership com-

mittee. Exs. 44, 45. Aberdeen and Lacey Lanes were denied membership because they were owned by the Loveless brothers, who also owned Secoma Lanes, a house disapproved by the overbuilding committee. Tr. 734-736, 746, 748. As a result they lost business because of the eligibility rule. Tr. 750.

Defendants rely heavily on *Lieberthal v. North Country Lanes,* Inc., 332 F.2d 269 (2nd Cir. 1964). But as the District Judge noted in his memorandum decision, that case is factually different from the present case. R. 233, Appendix D, *infra.* In *Lieberthal* the plaintiff alleged only a restraint of intrastate activities, the one bowling alley involved had never been built, and there were no allegations of multi-state activities or of impact on the interstate trade of other parties. Plaintiff here alleged a nationwide conspiracy and the involvement of interstate commerce in a variety of ways, and the trial court, guided by *Marks Food Corp. v. Barbara Ann Baking Co.,* 274 F.2d 934 (9th Cir. 1960) and *Monument Bowl, Inc. v. Northern Calif. Bowling Prop. Ass'n.,* 316 F.2d 787 (9th Cir. 1963), received evidence on the subject and submitted the issue to the jury, which returned to following special verdict:

> "Do you find, from a preponderance of the evidence, that the acts of the defendants substantially affected interstate commerce, and that the amount of commerce thus affected was not insubstantial or insignificant?
> "ANSWER: Yes." R. 223.

This finding is supported by substantial evidence, and settles the jurisdictional issue.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

WILLIAM L. DWYER
Attorney for Appellee

November 15, 1965

APPENDIX A

Index to Court's Instructions

APPENDIX B

DAMAGES BASED ON PLAINTIFF'S EVIDENCE OF LOST LEAGUES AND OTHER INCOME

League and Tournament	Net Loss
1961-62—	
City Tournament	$ 2,408.93
Invitational League	1,731.84
1962-63—	
Invitational League	1,731.84
Women's Invitational League	1,731.84
Tacoma Commercial League	1,731.84
Plywood League	1,231.88
1963-64—	
Invitational League	1,797.12
Women's Invitational League	1,797.12
Olympic League	2,164.80
Plywood League	1,284.10
Sub-total	$17,611.31
Open Play, Day League, and Other—	
1961 - 62	10,834.56
1962 - 63	10,834.56
1963 - 64	10,834.56
Sub-total	$32,503.68
TOTAL NET LOSS	$50,114.99

(The net loss computed by this method is greater than the damages found by the jury.)

DAMAGES BASED ON COMPARATIVE STANDARDIZED NET INCOME PER DEFENDANTS' FIGURES

Return to owner, Bowlero, 1961-1963	$119,486.00
Return to owner, New Frontier, 1961-1963	63,948.00
Total	183,434.00
Average return to owner, Bowlero and New Frontier, 1961-1963	91,717.00
Return to owner, Pacific Lanes, 1961-1963	(55,296.00)
NET LOSS (difference between plaintiff's net return and average of two defendant competitors)	$36,421.00

(The net loss computed by this method is greater than the damages found by the jury.)

DAMAGES BASED ON COMPARATIVE BOWLING LINEAGE

	1962	1963
Pacific Lanes—lineage keeping pace with three-house average	568,923	515,320
Pacific Lanes—actual lineage	482,277	471,586
Decrease	86,646	43,734
TWO-YEAR LINEAGE LOSS	130,380	
THREE-YEAR LINEAGE LOSS PER EX. 259	118,290	

(The net loss computed by this method is greater than the damages found by the jury.)

APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiffs, vs. SANTA CLARA VALLEY BOWLING PROPRIETORS' ASSOCIATION, a corporation, and NORTHERN CALIFORNIA BOWLING PROPRIETORS' ASSOCIATION, a corporation, Defendants.	No. 125346

* * *

CONCLUSIONS OF LAW

CONCLUSION OF LAW NO. 1

The Court has jurisdiction of the plaintiff and defendants and of the subject matter of this action.

CONCLUSION OF LAW NO. 2

The defendant, Santa Clara Association, a non-profit corporation, violated Section 16720 and 16726 of the Business and Professions Code of California in the following particulars:

(a) It increased and set the prices to be charged for bowling in Santa Clara County, California;

(b) It in one instance conspired to rig bids for public school bowling activities;

(c) It conspired with defendant Northern Asso-

ciation in unreasonable restraint of trade and to prevent competition in bowling in violation of sections 16720 and 16726 of the Business and Professions Code in adopting and enforcing a code of ethics provision and rules and regulations prohibiiting its members from offering or giving bowlers or leagues of bowlers competitive inducements, services or things of value of [*sic*] the purpose of stabilizing and maintaining prices within the industry.

(d) It enforced the 1960 national tournament eligibility rule of BPAA.

CONCLUSION OF LAW NO. 3

The defendant Northern Association violated Sections 16720 and 16726 of the Business and Professions Code of the State of California in the following particulars:

(a) It adopted and enforced a code of ethics provision and rules and regulations prohibiting its affiliates and members from offering or giving bowlers or leagues of bowlers competitive inducements, services, or things of value;

(b) It adopted the February 1960 Northern Association tournament eligibility rule;

(c) It adopted and enforced the 1960 national tournament eligibility rule of BPAA.

(d) It prohibited any member from advertising or giving any publicity in its establiishment to any local house tournament which had not been sanctioned by the Northern Association.

CONCLUSION OF LAW NO. 4

The tournament eligibility rule adopted by the defendant Northern Association on or about July

14, 1961 does not violate sections 16720 or 16726 of the Business and Professions Code of the State of California, and does not violate the Cartwright Act of the State of California.

CONCLUSION OF LAW NO. 5

Defendants Santa Clara Association, Northern Association, Co-conspirator BPAA, and the bowling proprietor members of said associations by the adoption and application of the BPAA eligibility rule combined, conspired and entered into agreements in unreasonable restraint of trade and to prevent competition in bowling in violation of sections 16720 and 16726 of the Business and Professions Code of California.

CONCLUSION OF LAW NO. 6

The BPAA tournament eligibility rule requiring bowlers to confine their league bowling exclusively to BPAA member establishments and the BPAA and Northern Association rules which required bowlers to confine their league, tournament and advertised exhibition bowling exclusively to BPAA member establishments each constituted a concerted refusal by BPAA members to deal with bowlers who patronized non-BPAA member competitors and a group boycott of such bowlers, a secondary boycott and agreement to coerce bowlers to not deal with non-BPAA members, a tying arrangement which tied and conditioned the sale of participation in proprietor tournaments upon the purchase from a BPAA member establishment of a bowler's entire requirement of league (or league, tournament and advertised exhibition) bowling, an unreasonable restraint upon trade and commerce, and a trust,

against public policy and void, in violation of sections 16720 and 16726 of the Business and Professions Code of California.

CONCLUSION OF LAW NO. 7

The Court concludes in all respects as set forth in the foregoing Findings of Fact.

Dated this 15th day of January, 1964.

Edwin J. Owens
Judge of the Superior Court

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

PACIFIC LANES, INC., Plaintiff, vs. WASHINGTON STATE BOWLING PROPRIETORS' ASSOCIATION, a corporation, *et al.*, Defendants.	**Civil Action No. 5381** **MEMORANDUM DECISION**

The above-entitled cause is now before the court upon defendants' motion for judgment notwithstanding the verdict or in the alternative for a new trial and also upon plaintiff's motion for an award of reasonable attorneys' fees in the amount of $30,000.

Defendants have not separately stated the grounds upon which their motion for judgment notwithstanding the verdict is based. However, it appears that of the fifteen allegations of error points numbered 1, 10 and 13 relate to this issue and the remaining twelve are in support of defendants' motion for new trial. Points 1, 10 and 13 will be discussed first.

The first ground of error is:

> "There was no evidence, or any reasonable inference from evidence, that plaintiff and defendants were engaged in interstate commerce or that any restraint with which defendants were charged substantially affected interstate

commerce within the meanings of Sections 1 and 2 of the Sherman Act."

Grounds 10 and 13, in substance, are that the court should have ruled as a matter of law that no substantial effect upon interstate commerce existed; that the question should not have been submitted to the jury; and that the issue was one of jurisdiction which is always to be ruled upon by the court. For support, the defendants rely upon *Lieberthal v. North Country Lanes, Inc.*, 221 F. Supp. 685, affirmed 332 F.2d 269 (2 Cir. 1964).

The court has given thoughtful attention to the *Lieberthal* case and has declined to follow it for two reasons. First, because *Lieberthal* is factually different from the present case; and second, because I feel our circuit has different views than the second circuit with respect to certain crucial points.

In the *Lieberthal* case the bowling alley had not yet begun operation. It had been built but not equipped. At that point the lease was cancelled by the defendant because, as alleged by plaintiff, of a conspiracy in restraint of trade. There was a provision in the lease which provided for cancellation by the defendant. The plaintiff alleged that the flow of equipment and supplies to the new alley constituted interstate commerce and that there would be interstate solicitation of bowlers once the alley commenced business. The district court found that the installation of equipment was a "one shot" affair, and the further flow of supplies to the alley would be too insignificant to put it into the stream of interstate commerce. Furthermore, the plaintiff did not allege a restraint in the interstate activities of the defendant, only a restraint in the intrastate ones. On this basis the second circuit affirmed.

In the case at bar the plaintiff had an established, thriving business. He alleged that interstate restraints were directly affecting that business and that the amount was substantial. And he alleged that the interstate restraints were tending towards a monopoly of the bowling business in the State of Washington. The specific effect of the alleged restraints was a reduced capacity to participate in tournaments and to draw out-of-state bowlers to tournaments, a reduction of the interstate rental payments which were substantial and continuous, and a reduced amount of incidental purchases of bowling supplies such as shoes, balls, and pins. These allegations of fact, in my opinion, were enough to cast doubt upon the applicability of *Lieberthal* to the Pacific Lanes' situation.

Secondly, our circuit has recently ruled upon a case where the factual situation is the twin of the one at bar—*Monument Bowl, Inc. v. Northern Calif. Bowling Prop. Ass'n.,* 197 F. Supp. 208 (N.D. Calif. 1961), reversed 316 F.2d 787. While that case only decided upon the advisability of permitting a motion to amend a complaint it does give some guidance in this situation. In *Monument Bowl* the district judge dismissed the complaint because the plantiffs had failed to allege a restraint of "commerce among the several states." The plaintiff made no such error here. Furthermore, the district judge was not inclined to permit amendment. He felt the complaint contained such "inherent frailties" that an amendment could not cure them. Our court of appeals reversed. Quoting *United States v. Hougham* (1960) 364 U.S. 310, the court said:

> " 'If the underlying facts or circumstances relied upon by a plaintiff *may be* a proper sub-

> ject of relief, he ought to be afforded an opportunity to test his claim on the merits.' " (Emphasis added.)

I confess to having harbored the same doubts as did the district judge in *Monument Bowl.* Judging solely by the complaint the interstate commerce involved here appeared negligible. However, as I read *Monument Bowl* the decisional tenor of our circuit counsels patience and urges inquiry into the facts. Summary dismissals are not favored. Only after the evidence is in, when it is apparent the plaintiff cannot recover, is it proper to dismiss the action. The plaintiff in the present case pleaded jurisdictional facts. Jurisdiction depends upon facts pleaded—not facts proved. The court was therefore constrained to closet any motion to dismiss based upon jurisdiction until proof upon this issue was adduced. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* (1951) 341 U.S. 246, 249. Even if the parties had agreed to try the issue of jurisdiction separately (which they had not) the result would be the same. The over-all merits of the case and the facts relevant to jurisdiction were intermingled. They were so intermingled that the most sensible and expeditious way to dispose of the case was by trial. Fortunately, the court was able to find a case from our circuit which further supported its decision to try the case. The holding of *Marks Food Corporation v. Barbara Ann Baking Co.,* (9 Cir. 1960) 274 F.2d 934, is situationally in point. The court there stated:

> "It seems to us that a safe practice would be never to separate the subject matter jurisdiction issue for separate trial in cases where the factual merits of the case must be considered in deciding the separated issue."

This is precisely what the court would have had to do—consider the factual merits of the claim in deciding the jurisdictional issue. Once the evidence had come in I was unable to say, as a matter of law, that the connection of the parties with interstate commerce was "insignificant and insubstantial." The jury being the trier of facts, it fell to them, after proper instruction, to decide this question. In response to specific interrogatories, the jury found that the amount of interstate commerce affected was not "insubstantial or insignificant," settling the jurisdictional question.

Under the law in the ninth circuit, as I interpret it, and the evidence as adduced in this case the questions with respect to impact on interstate commerce, restraint of trade and monopoliation were issues for consideration and determination by the jury and the motion for judgment notwithstanding the verdict will be denied.

The remaining specifications of error set forth in defendants' motion relate to alleged grounds justifying or requiring a new trial.

For their second, third and fourth grounds of error the defendants claim that the court committed prejudicial error in giving an instruction on group boycotts and in failing to give certain requested instructions of the defendants. These omitted requests were numbered 23, 27 and 29.

Unquestionably, it is the duty of the court to give a correct requested instruction. On the other hand, it is Hornbook law that the court is not required to give, as requested, instructions which need explanation, modification or qualification, C.J.S., Trials § 408.

Regarding the group boycott instruction, the defendants do not contend that it is an incorrect state-

ment of the law. The claimed error is that in failing to give requests 23, 27 and 29 the group boycott instruction by itself was "misleading," and its "misleading" effect could only be overcome by "balancing" with the defendants' requests.

Throughout the trial there was an abundance of evidence that the defendants had combined and refused to sanction any bowler for tournament play unless he did his bowling exclusively in an Association establishment. In the complaint the plaintiff had specifically alleged a violation of the Clayton Act provision relating to tying agreements; the plaintiff specifically alleged a group boycott with the purpose of establishing a monopoly (complaint pp. 7, 5 and 6).

Furthermore, the plaintiff introduced voluminous evidence of meetings, writings, statements, and actions on the part of the individual defendants and the Association which tended to show that their combined aim was the exclusion of competition. The tendency and necessary effect of such an exclusion is a restraint of trade. In view of all this evidence, from the witnesses of both parties, it seems to me that it would have been plain error *not* to give a group boycott instruction.

Defendants' theory in response to these allegations seemed to be that past abuses in the sport of bowling had necessitated the formation of the Association "to promote, and protect the sport of bowling." *Fashion Originators' Guild v. Federal Trade Commission* (1941) 312 U.S. 457, shows clearly that there are limitations upon the powers of an association to restrict even abuses which are admittedly unfair. Furthermore, trade associations, because of their obvious temptations to concerted action, are closely scrutinized by the courts and the adminis-

trative agencies. See generally, *Fashion Originators' Guild v. Federal Trade Commission,* supra; *Federal Trade Commission v. Cement Institute,* (1948) 333 U.S. 683; *Associated Press v. United States* (1945) 326 U.S. 1; *Christiansen v. Mechanical Contractors Bid Depository* (D. Utah 1964) 230 F. Supp. 186. Associations may be formed and may operate, but they have a perimeter that has been judicially described. If the defendants wished to have the jury instructed upon the rule-making power of an association it was the defendants' duty to submit an instruction which clearly and accurately outlined the limits of the perimeter.

The following are the requests submitted by the defendants on this issue:

No. 23:

> "Defendants have the right to adopt and enforce rules and regulations in order to regulate, standardize, and promote competition in the sport of bowling, and such regulations are not unlawful even though an incidental effect may be to restrict the business of the plaintiff. *United States v. West Trotting Association,* 1960 Trade Cases, Para. 69, 761 (SD.Ohio, 1960) *United States v. Bakersfield Associated Plumbinng Contractors, Inc.,* 1958 Trade Cases, Para. 69, 087."

No. 27:

> "If you find that the main purpose and chief effect of the eligibility rule and its enforcement is to foster the bowling business by the promotion of standardized rules and regulations regarding participation in tournaments without any unlawful intent to monopolize or restrict trade, then even though such rules or regulations incidentally restricted competition and interstate commerce, such acts do not con-

stitute a monopoly or attempted monopoly in violation of the antitrust statutes of the United States.
Whitwell v. Continental Tobacco Co., 125 F. 454."

No. 29:

"An association composed of members involved in the same business or calling may make reasonable rules and regulations and may impose sanctions upon such members for a violation of said rules, including fines and expulsion of such members for a violation of rules. Such acts and practices are not unlawful.
U.S. v. Southern Wholesale Growers Association, 207 F. 434."

Regarding number 23, this instruction appears to be questionable on its face. I have always supposed that no organization, other than Congress or bodies authorized by Congress, have the "right to adopt and enforce rules and regulations in order to regulate * * * competition in the sport of bowling," unless the bowling activities are wholly intrastate. To hold otherwise would be to allow businessmen to regulate themselves and would trench upon the authority of the courts and administrative bodies. See *Fashion Originators Guild v. Federal Trade Commission,* supra. The requested instruction further implies a policy which is antagonistic to the purpose of the antitrust laws. That purpose is to promote the free and unrestricted interplay of competition. Defendants' request would indicate that businessmen may regulate competition as they please, so long as their avowed purpose is a salutary one.

Additionally it should be noted that the facts in *United States v. West Trotting Association* (correct citation is "United States Trotting Association")

were materially different from the facts at bar. There the government moved for summary judgment on the ground that the rules of the trotting association were unlawful *per se*. The court held that the association rules were not unlawful *per se*. Both parties agreed that they had no further proof to offer, and the court therefore made a statement of factual findings. The ones applicable to this case are as follows:

1. USTA had never denied track membership to any application for a five-year period prior to the complaint.

2. The plaintiff failed to establish that the main purpose of the association and its rules was different from its stated purpose of providing a *voluntary association open to all those interested in the betterment of harness racing*. (Emphasis added.)

3. Since USTA admitted all those interested in racing, there was no monopoly.

4. Out of 10,709 applications for individual membership, only 6 were rejected. The rejections were for infractions such as race fixing, and one rejectant had a long list of gambling convictions.

5. All of the rules and regulations were adopted to meet undisputed evils which had previously occurred in racing.

6. The eligibility certificates for each horse were $2 and were issued only to members in good standing.

7. There were only 31 horses and owners under suspension, out of all those registered, and the suspensions had been given for such offenses such as (a) failing to pay entry fees; (b) bad checks; and (c) forging mating certificates.

8. USTA functions in subordination to all state laws, and this is stated specifically in its charter.

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8. USTA functions in subordination to all state laws, and this is stated specifically in its charter.

9. One rule of the USTA was that horses which were not members of the USTA were barred from participating in any race except a "free for all," which was limited to horses that had won over $50,000. However, USTA had never in fact denied any eligibility certificate under this rule (Rule 5, § 1.).

10. USTA takes no direct part in the management of any race meeting.

Contrast this with the situation in Pacific Lanes. Here, testimony, documents, and admissions—tacit and otherwise—clearly permitted the inference that the true purpose of the association was two-fold: to promote bowling in the Tacoma area, and to do so by impeding the competitive effectiveness of the "independent" bowling proprietors. The evidence indicated that the Association accomplished the latter of its twin purposes by concerted pressure, by denying applications for "eligibility certificates," and making the forms abstruse and difficult to fill out. The Association did not admit all those interested in bowling. In practice, it only admitted the larger, newer establishments. The dues were high, possibly by design, so that the smaller, older houses could not afford the price of the Association. The evidence will sustain a finding that the "evils" which the Association has supposedly been formed to combat were of doubtful existence. "Sandbagging," or deliberately bowling below one's capacity, was one of the claimed abuses which required the formation of the Association. However, many of the witnesses claimed that they had never heard of any instances of this practice, or of "rigging" or of the other infractions claimed by the defendant to be threatening the competitive health of the bowling industry.

On the other hand, the existence of the Over-

building Committee, and its attempts to restrict the construction of new bowling facilities, was further evidence that the chief "abuse" concerning the Association may have been only that of stiff competition among bowling houses rather than unfair practices on the part of competitors in the sport of bowling, as they claimed. All of these factors, when taken together were strong indications that a dominant theme in the Association's existence was the curtailment of competition. Finally, the crucial difference between the *Trotting* case and the case at bar is that USTA took no direct part in the managment of any race meeting. This is telling evidence of the good faith of USTA; their only profit was the general betterment of the sport. With the members of the Bowling Proprietors' Association, however, the facts are reversed. The Association promoted, and its members received a direct, financial benefit from the tournaments sponsored by the BPAA.

Based upon the *Trotting* case, the defendants' request should have contained standards for judging whether the rules adopted by the BPAA were reasonable in light of the evidence. Some of these might have been:

(a) Whether the Proprietors' Association was open to all;

(b) Whether the dues were reasonable;

(c) Whether the proprietors had any financial interest in the tournaments;

(d) Whether the rules were a reasonable approach to the correction of the alleged abuses; and

(e) Whether it is reasonable to suspend a member for any violation other than one which involves fraud or a failure to keep the

equipment maintained according to an objective standard.

None of the above standards were included in request 23; nor was there any statement in this request regarding the scope or effect of the organization's rule-making power in the event there was an underlying conspiracy, which the jury later found existed. Therefore, by the *ratio decidendi* of this case the defendants' request is an inadequate statement of the law in view of the proof presented at trial.

In the defendants' request 23 there was no explanation of the effect that collusion would have on the "reasonableness" of the rules adopted.

The evidence tending to prove unfair practices on the part of the defendants also nullifies *Bakersfield* as authority for the defendants' request, for the same reasons discussed regarding the *Trotting* case.

Defendants' requested instruction 23 was discussed in the conference on instructions, but it was rejected as written (pp. 28, 29, Transcript of Proceedings December 24, 1964 at 10:00 a.m.). At the time I considered using certain of defendants' requests to balance the plaintiff's request on group boycotts. However, the cases cited in support of the defendants' request did not support the language of the proposed instruction when taken in conjunction with the evidence of the case. The request as submitted was therefore refused. Thereafter no rewritten request was submitted.

Proceeding to defendants' request 27, it is my opinion that it is an incomplete statement of the law as it stands today. The cited authority for this case is a 1903 eighth circuit case. A few years after

this decision the Clayton Act was passed, and Judge Medina in *Dictograph Products v. Federal Trade Commission* (2 Cir. 1954) 217 F.2d 821, was of the opinion that the Clayton Act (with its specific proscription to tying arrangements and the "may be" test) was passed to overrule this decision. As authority for such an instruction *Whitwell* is therefore seriously in question. Moreover, the instruction is incomplete in that it does not explain the course for the jury if the incidental effect is one that "may be to substantially lessen competition." This is precisely why group boycotts are illegal.

Considering next defendants' requested instruction number 29, the cited authority in support is a 1913 district court case from the fifth circuit. While the age of a case is not necessarily an infirmity it invokes an attitude of caution, especially in a field of law subject to fairly rapid developments. I believe it was Justice Holmes who said that the maximum precedent-life of a case was twenty years; and he was talking about Supreme Court cases. As with the *Whitwell* case, the Clayton Act and the Federal Trade Commission Act were both passed after this decision. Both acts have had a profound effect upon trade associations and their conduct. Moreover, *Southern Wholesale Grocers* has only been cited once by a higher court (in 1925) during its sixty or so years of existence. All these were circumstances for consideration in deciding whether to add still more to the voluminous instructions which the jury were to receive.

Request 29 is also, in my opinion, misleading. It implies that business men may freely band together, make rules among themselves and impose appropriate sanctions to enforce those rules. Since there is nothing in the request to the contrary the wording

infers a perfect freedom of association and rule-making power, including, presumably, the power to make rules affecting competition. This is not the law. A similar argument of unlimited association was urged upon the Supreme Court in *Associated Press v. United States* (1945) 326 U.S. 1, 15. The court there stated:

> "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete."

The defendants' request would appear to lead the jury to a different opinion of what the law is. Being an incomplete statement of the law, the defendants' request 29 was rejected.

There is one final comment which runs to all three of the requests—they are essentially arguments. Underlying each of the requests is the question of intent and effect. Associations may make rules and regulations providing their intent, effect, and tendency is not restrictive. The questions of intent and restraint were treated at length in the instructions (pages 18, 23 and 25 of the instructions). These requests of the defendants are primarily a response, showing motivations, to the charge of restraint and monopolization. Counsel for defendants could have and, as I recall, did argue to the jury what the various reasons were behind the actions of the bowling associations. The purpose of instructions is to expound the law and not present argument. It is the duty of counsel to argue the case.

Defendants' fifth ground of error is that the court should have instructed the jury that the plain-

tiff was not entitled to recover for a violation of the antitrust laws in general. The jury was instructed according to the test in *Page v. Work* (1961) 290 F.2d 323; the jury was told that the plaintiff could recover only if the interstate restraint affected his business.

Defendants' sixth ground of error is the failure of the court to instruct the jury (requested instruction number 33) that harm to the general public is an essential element. The short answer to this contention is that the jury found defendants violated both Sections 1 and 2 of the Sherman Act. The Supreme Court in *Klor's, Inc. v. Broadway - Hale Stores, Inc.,* (1959) 359 U.S. 207, 211, in commenting on violation of said sections of the law, stated (referring to an earlier decision):

> "As to these classes of restraints * * * Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred."

For this reason the defendants' request was refused.

Defendants' seventh ground of error is the failure of the court to give their request number 34. This request was subject to the same objection noted with respect to request number 33. It pointed out to the jury that if plaintiff's competition was only with other bowling proprietors in the State of Washington there was no injury within the purview of the Sherman Act. It is the nature of the restraint which determines jurisdiction under the Sherman Act, not the identity of the competitor. See *Broadway-Hale,* supra. The defendants' request was properly refused.

Defendants' eight ground of error is the court's failure to give requested instruction number 11,

stating that if the same goods were purchased within the State of Washington, and the same amount of bowling business was conducted within the State of Washington, there would be no effect upon interstate commerce. Our circuit has ruled that the test of an effect upon interstate commerce is qualitative, not quantitative. See *Las Vegas Merchant Plumbers Association v United States* (9 Cir. 1954) 210 F.2d 732. Therefore, if the defendants' actions had only a distortionary effect—and not necessarily a diminishing one—their conduct would still be subject to the sanctions of the antitrust laws. The requested instruction did not correctly state the applicable law.

Defendants' ninth allegation of error complains of a comment contained in the court's instructions with respect to the size or area subject to monopolization, as follows:

> "Combination that affects trade in one city or even a part of a city may violate the antitrust laws."

It is my view that the evidence fully justified the statement and that the comment—if it be considered such—was applicable under the facts of the case.

The remaining allegations of error need but brief comment. Numbers 10 and 13 were dealt with at length at the beginning of this memorandum.

The alleged error numbered 11 relates to the ruling not permitting certain exhibits used by defendants' expert witnesses in support of their testimony to go to the jury. This could not have been prejudicial. The exhibits were illustrative only and the true evidence was the opinion of the expert as to possible damages.

The twelfth alleged error to the effect that the jury was governed by passion and prejudice because

of the allegedly short time spent in deliberation and the size of the verdict is submitted without affidavit or showing of any kind and therefore needs no further consideration.

The contention made by defendants, under the fourteenth ground of their motion, that requested instruction No. 18 as to mitigation of damages should have been given, I believe is without merit for the reason that in the event the jury should find as they did that plaintiff had suffered damage there was no evidence whatsoever tending to prove that plaintiff had not made reasonable efforts to develop open-play bowling.

Likewise, with respect to alleged error No. 15, my view of the evidence supporting the instruction given to the effect that price-fixing constituting a *per se* violation of the Sherman Act is contrary to that expressed by defendants and I therefore reach the conclusion as to this alleged error, as well as to all alleged errors set forth in defendants' motion as grounds for granting a new trial, that no prejudicial error occurred.

ALLOWANCE OF ATTORNEYS' FEES

Plaintiffs having prevailed in this action, an application has been made for an allowance of attorneys' fee as provided by statute in the amount of $30,000. While the testimony of counsel in support of the amount sought as well as the estimate of time spent in preparation and trial would sustain allowance of $30,000, it is my view that the records of plaintiff's counsel with respect to the precise nature of the work done are inadequate. As I stated in a memorandum decision in the case of *Barksdale v. Time Oil Company,* Civil #5638, counsel employed

to initiate antitrust litigation know at the onset of the proceedings that they will request an attorney's fee under the statute if they prevail. The statute, I believe, anticipates that such application be supported by detailed records of time spent and work done. I do not believe the time records as submitted in this case are sufficiently detailed as to service performed to justify an allowance of $30,000. I will allow the sum of $22,500.

An order in accordance herewith may be submitted by counsel for plaintiff.

DATED March 9, 1965.

William J. Lindberg
United States District Judge

No. 20134

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE BOWLING PROPRIETORS ASSOCIATION, INC., a corporation, **PIERCE-OLYMPIC BOWLING PROPRIETORS ASSOCIATION, INC.**, a corporation, **TOWER LANES, INC.**, a corporation, **BOWLERO, INC.**, a corporation, **DAFFODIL BOWL, INC.**, a corporation, **PARADISE BOWL, INC.**, a corporation, **C. A. LOYD** and **JANE DOE LOYD**, his wife, d/b/a **SIXTH AVENUE LANES, THEODORE TADICH** and **JANE DOE TADICH**, his wife, **DEZ ISAACSON** and **JANE DOE ISAACSON**, his wife, **KENNETH KULM** and **JANE DOE KULM**, his wife, **PHILLIP CUNNINGHAM** and **JANE DOE CUNNINGHAM**, his wife, **CLEVE REDIG** and **JANE DOE REDIG**, his wife, and **ART UNKRUR** and **JANE DOE UNKRUR**, his wife,

Appellants,

vs.

PACIFIC LANES, INC., a corporation,

Appellee.

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Honorable **William J. Lindberg**, District Judge.

Appellants' Petition for Rehearing

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Service of the within brief for Appellants is hereby accepted in Seattle, Washington, the day indicated by receiving three copies thereof.

.....day of ....., 1965

.....

Attorneys for Pacific
Lanes, Inc.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE BOWLING PROPRIETORS ASSOCIATION, INC., a corporation, **PIERCE-OLYMPIC BOWLING PROPRIETORS ASSOCIATION, INC.**, a corporation, **TOWER LANES, INC.**, a corporation, **BOWLERO, INC.**, a corporation, **DAFFODIL BOWL, INC.**, a corporation, **PARADISE BOWL, INC.**, a corporation, **C. A. LOYD** and **JANE DOE LOYD**, his wife, d/b/a **SIXTH AVENUE LANES**, **THEODORE TADICH** and **JANE DOE TADICH**, his wife, **DEZ ISAACSON** and **JANE DOE ISAACSON**, his wife, **KENNETH KULM** and **JANE DOE KULM**, his wife, **PHILLIP CUNNINGHAM** and **JANE DOE CUNNINGHAM**, his wife, **CLEVE REDIG** and **JANE DOE REDIG**, his wife, and **ART UNKRUR** and **JANE DOE UNKRUR**, his wife,

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Appellants' Petition for Rehearing

To The Honorable Stanley N. Barnes, M. Oliver Koelsch, and James R. Browning, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Pursuant to Rule 23 of the Rules of this Court, defendant-appellants pray that this Court grant rehearing and

reconsider its judgment of February 2, 1966 for the following reasons:

I.

This Court has twice in finding a basis for affirmance, stated that the district court did *not* instruct the jury that the eligibility rule was per se violation, but rather defined a group boycott in general terms and "left it to the jury to determine whether or not the eligibility rule was in fact a group boycott." (Slip. Op. pp. 5, 7.) This misapprehends the nature of the instructions, for they told the jury that a group boycott had been effected. After stating the nature and effect of per se violations, thus fixing in the jury's mind the link between price fixing and group boycotts *as examples,* the trial court gave the boycott instructions, immediately followed by the price fixing instructions (Tr. 2773-4):

[Boycott Instructions]

"For purposes of this case, a group boycott may be defined as the concerted refusal of a group of persons engaged in some line of commerce to deal with others—that is, to sell their goods or services to others—unless the potential customers agree that they will not do business with other firms which are competitors of the persons in the group. In other words, a group boycott is a combination of business concerns to boycott potential customers unless the customers restrict their trade and custom to the members of the group and avoid patronizing outside competitors.

"A group boycott is unlawful even though those who are parties to it claim that it was adopted for the purpose of eliminating practices thought by them to be trade abuses or undesirable trade practices."

[Price Fixing Instructions]

"The plaintiff claims that the defendants entered into a conspiracy or combination to fix the price charged for bowling. *If you should find that the defendants did conspire to fix the price charged for bowling in Western Washington,* and the conspiracy—if any existed—did not substantially affect the flow of interstate commerce, in other words, it was a purely local conspiracy, then there would be no violation of the antitrust laws. However, if you find that some amount of interstate commerce was affected, and that amount was not insignificant, as I will more fully explain later, then any conspiracy to fix prices would be a violation of the federal antitrust laws." (Emphasis added.)

In contrast with the price fixing instructions, no opportunity was given to the jury to reach a decision on the issue: "*If* you should find that the defendants did conspire to establish a group boycott, ..." The crucial fact issue, "was the eligibility rule a group boycott" was effectively withdrawn from the jury. Appellants respectfully submit that this Court would not want to deny them a jury verdict on this issue — yet this has been the result herein.

II.

The questions of law respecting group boycotts in this case are novel and are not answered by the *Klor's, Radiant Burners'* or *Jerrold Electronics* decisions. As contrasted with those instances of group action withholding all dealings essential to the victim's business, the eligibility rule is not a refusal "to deal with customers"; if it can be termed a refusal to deal at all, it is with respect to non-customers, *i.e.,* a disqualification of customers of non-members to bowl in appellants' tournaments. This Court has now labeled as illegal per se an eligibility rule for a limited number of bowling tournaments, having application only to a small number of the multitude of recreational bowlers and having no direct effect on commerce. This disregards the Supreme Court's view that "the area of *per se* liability is carefully limited" (reply br. p. 3), and makes per se unlawful *any* withholding from non-members by a trade association any of its facilities or programs. This Court should reconsider whether the per se rule was applicable in this case.

III.

With respect to the damage period issue, this Court bases its decision "on the lack of surprise to appellants, and the trial theory pursued below. . . ." (P. 10.) We know of no authority, and this Court cites none, that a

supplemental pleading to enlarge, on the basis of acts occurring after the filing date, the relief requested is excused because of "lack of surprise" to the other party. Such a theory is fraught with danger and will work injustice in future cases as it does here. The burden is on the pleader to supplement his pleading if he desires to rely on post-filing circumstances. This burden was not satisfied by the pre-trial order. The order was not a supplemental pleading, either literally or by implication. The effect of this Court's opinion is to construe it as if it were. This is contrary to Rules 15(d) and 16 of the Federal Rules, opens the door to attempts to recover post-filing damages without supplemental pleadings, and shifts the burden to the opposite party. This Court should correct this departure from settled law.

The trial theory pursued by the appellants was that damages based on post-filing acts were not recoverable and evidence thereof was inadmissible. Appellee pursued the contrary theory. Appellants' objections and requested instructions[1] were refused by the district court, and they were forced to defend themselves on the lines drawn by the district court. To term these circumstances to be a "waiver" finds no support in either precedent or fairness. Appellee had the burden of preserving its position; the opinion of this Court has shifted that burden to the appellants.

IV.

Under long-standing decisions of this Court, appellants' motion for new trial on the ground the verdict was "grossly excessive" and was "not supported by the evidence" (R. 231), preserved for review the lack of evidence of both

[1] The request clearly served as an objection to the charge since "it expresses a differing theory of law." (Op. p. 9, n. 3.)

the *fact* and *amount* of damages. This Court now holds to the contrary by stating "this claim was not raised at the trial — there was no motion for a directed verdict . . ." (p. 10). This is a departure from settled law, which this Court should correct.

This Court's opinion assumes appellants questioned only the lack of evidence of the *amount* of damages. No mention is made of their contention that, as to substantially all of the verdict, there was no evidence of the *fact* of damage. In turning its attention solely to the *amount* of damages, this Court has approved a substantial verdict based upon no evidence, or at best purely speculative evidence, to support the *fact* of damage. The absence of evidence of the *fact* of damage is an important issue deserving of this Court's consideration.

Respectfully submitted,

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Certificate of Counsel.

We certify that in our judgment the foregoing petition for rehearing is well founded and is not interposed for delay.

SAMUEL W. BLOCK
KENNETH J. BURNS, JR.

February 25, 1966

No. 20134

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE BOWLING PROPRIETORS ASSOCIATION, INC., a corporation, **PIERCE-OLYMPIC BOWLING PROPRIETORS ASSOCIATION, INC.**, a corporation, **TOWER LANES, INC.**, a corporation, **BOWLERO, INC.**, a corporation, **DAFFODIL BOWL, INC.**, a corporation, **PARADISE BOWL, INC.**, a corporation, **C. A. LOYD** and **JANE DOE LOYD**, his wife, d/b/a **SIXTH AVENUE LANES, THEODORE TADICH** and **JANE DOE TADICH**, his wife, **DEZ ISAACSON** and **JANE DOE ISAACSON**, his wife, **KENNETH KULM** and **JANE DOE KULM**, his wife, **PHILLIP CUNNINGHAM** and **JANE DOE CUNNINGHAM**, his wife, **CLEVE REDIG** and **JANE DOE REDIG**, his wife, and **ART UNKRUR** and **JANE DOE UNKRUR**, his wife,

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BRIEF FOR APPELLANTS

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Appeal from the United States District Court for the Western District of Washington, Northern Division.
Honorable **William J. Lindberg**, District Judge.

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT.

This is an action under the Federal antitrust laws for treble damages, brought by the proprietor of a bowling establishment in Tacoma, Washington against a group of proprietors of other bowling establishments in Tacoma

and the state and local trade associations of bowling proprietors in which the defendant proprietors are members and in which the plaintiff was at one time a member. The defendants appeal from the judgment of the District Court, entered upon the jury's verdict in favor of the plaintiff in the amount of $35,000 (Tr. 2813-7), which was trebled to $105,000, together with an allowance of $22,500 for plaintiff's attorneys' fees. (R. 249.)

The plaintiff, Pacific Lanes, Inc., filed its complaint in the District Court on December 7, 1961. (R. 1.) Plaintiff alleged that beginning sometime prior to the time it opened for business on October 9, 1959, the defendants engaged in a conspiracy and combination extending throughout the United States, including western Washington, and consisting of a continuing agreement and concert of action by the defendants and other co-conspirators:

1. To conduct bowling tournaments open only to those who restrict or agree to restrict their league and tournament bowling entirely to member establishments, thereby declaring ineligible any bowler who does or has done any such bowling in a non-member establishment.

2. To limit and restrict the number and size of bowling establishments by coercing and dissuading others from building or expanding such establishments and by soliciting suppliers of bowling equipment and other persons not to deal with such persons.

3. To fix and stabilize prices charged for bowling and to refrain from competing for patronage except as against non-member establishments.

4. To regulate and control the size of bowling establishments and the conditions under which bowling may be carried on. (R. 5-6, 170-172.)

Plaintiff claims that the conspiracy caused injury to its business and constituted an unlawful combination in restraint of, and an unlawful attempt to monopolize, interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 USCA §§1, 2)[1] and Sections 3 and 7 of the Clayton Act (15 USCA §§ 14, 18). (R. 7.) The alleged Clayton Act violations were withdrawn prior to submission of the case to the jury.

Plaintiff alleged it had sustained $40,000 actual damages, and it prayed for recovery thereof trebled, together with a preliminary injunction to restrain the enforcement of the above tournament eligibility rule against it. (R. 8.) The injunctive relief sought has been abandoned.

The District Court found in its pretrial order that it had jurisdiction of the action under Sections 4 and 16 of the Clayton Act (15 USCA § 15 [suits by persons injured] and § 26 [injunctive relief for private parties]). (R. 160.)

The defendants are the following[2]:

(a) The Washington State Bowling Proprietors Association, Inc. (WSBPA) is a non-stock, non-profit Washington corporation having its principal place of business in Seattle. The members of the WSBPA are individual

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[1] Sections 1 and 2 of the Sherman Act are set out in Appendix A below.

[2] The Bowling Proprietors Association of America, Inc., is an Illinois corporation having its principal office in Park Ridge, Illinois. The members of the BPAA are individual and corporate proprietors of bowling establishments throughout the United States. (R. 161.) The BPAA was named as another defendant in this action. However, service as to it was quashed and it was not a party below and is not a party in this appeal. (R. 20.)

and corporate owners and operators of bowling establishments throughout the State. (R. 161.)

(b) The Pierce-Olympic Bowling Proprietors Association, Inc., (POBPA) is a non-stock, non-profit Washington corporation having its principal offices at Tacoma. Its members are individual and corporate proprietors of bowling establishments in Pierce County, Washington. (R. 161.)

(c) Tower Lanes, Inc., Bowlero, Inc., Daffodil Bowl, Inc., and Paradise Bowl, Inc., are each a Washington corporation having its office in Pierce County and engaged in the bowling business in that County. Each is and has at all relevant times been a member of the WSBPA and the POBPA. (R. 161-2.)

(d) There are 14 individual defendants, comprised of seven sets of husbands and wives, each being a marital community under the laws of Washington. Each of the defendant husbands at various times pertinent to the action was and is an operator or officer of an operator of a bowling establishment in Pierce County and a member or officer of a member of the two trade associations. (R. 162.)

The case was tried before a jury commencing December 4, 1964 and concluding with the verdict announced on December 31, 1964. (Tr. 1, 2820.)

At the close of plaintiff's case, defendants moved orally for a directed verdict on the grounds that the plaintiff's evidence did not substantiate that there was a restraint on interstate commerce. (Tr. 1226, 1228-36.) The Court denied the motion with respect to the alleged violations of the antitrust laws by virtue of the eligibility rule and reserved ruling with respect to the "overbuilding" element of the case. (Tr. 1236-8.) The motion was renewed at the close of all the evidence and denied. (Tr. 2540.)

After verdict, defendants moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The gist of the grounds alleged in support of the motion were: The evidence was insufficient to show that any alleged restraint had any effect upon interstate commerce; the Court erroneously instructed the jury that the tournament eligibility rule was a group boycott illegal per se and, in effect, that the defendants could not lawfully have any eligibility rule; that the instruction that price fixing was a per se violation was erroneous because under the evidence it was not applicable; the Court erred in failing to direct the verdict for defendants, in failing to give instructions offered by the defendants, and in failing to allow certain of defendants' exhibits to go to the jury during its deliberations; and the verdict was grossly excessive and not supported by the evidence. (R. 227.)

The motion was denied by the Court in a memorandum decision filed March 9, 1965. (R. 232.) Judgment was entered on the verdict on March 9, 1965. (R. 249.)

The District Court had jurisdiction in this case under the above sections of the Clayton Act and 28 USCA § 1337. This appeal is authorized by 28 USCA § 1291, which vests this Court with jurisdiction to hear appeals from final decisions of the District Court. Defendant's notice of appeal was timely filed on March 31, 1965, within 30 days after the District Court entered its final judgment. (R. 252.)

STATEMENT OF THE FACTS.

The background in which the action arises is the sport or recreation of bowling. Bowling has become one of the most popular sports in the United States. Approximately 36 million Americans bowl each year and they are served by approximately 9,500 commercial bowling establishments. (R. 95.)

Bowling involves three distinct components: First, the bowling proprietors who own and operate the establishments in which the sport is conducted. Second, the bowling manufacturers who provide to the proprietors the lanes, equipment and supplies necessary to equip and operate bowling establishments. Third, the bowler who actually participates in the sport at a bowling establishment.

Proprietors: The parties in this case are a part of the first component. The individual parties, including corporations, are proprietors of bowling establishments in Tacoma, Washington. The WSBPA is the trade association of bowling proprietors in Washington and the POBPA is the trade association of bowling proprietors in Tacoma.

The majority, or about 6500, of the commercial bowling establishments in the United States are owned by members of the Bowling Proprietors Association of America, Inc., which is the national trade association of proprietors. (R. 95; Tr. 122, 126.) The BPAA is an Illinois not-for-profit corporation with its home office in Park Ridge, Illinois. (Tr. 123, 125-6.) It renders a variety of services for its member proprietors, such as education and information through management bulletins and kits of materials for new members, and kits on how to organize leagues. (Tr. 1612-3.)

There are 50 state trade associations of bowling proprietors which are affiliated with the BPAA. (Tr. 130-1.) Defendant WSBPA is one such affiliate. (Tr. 149.) There are approximately 175 bowling establishments in the WSBPA. These establishments have about 3,000 bowling lanes and constitute about 90% of the commercial bowling establishments in Washington. (Tr. 369-72, 702.) One thing done by the WSBPA has been a forum each year for bowling instructors, and it renders other services for its members, including an insurance trust fund for members and their employees. (Tr. 1613, 2326, 2340, 2406-7.)

There are in addition local trade associations of bowling proprietors which are affiliated with the BPAA through their respective state associations. (Tr. 131.) Defendant POBPA is one such local affiliate. (Tr. 149.) Individual bowling proprietors who are members of their respective local and state affiliated proprietor associations automatically become members of the BPAA. (Tr. 131.)

The POBPA was organized about mid-1959. (Tr. 1692, 2120.) The area which it serves in Washington is Pierce County in which Tacoma is located. One of its services to its members is a cooperative advertising program. (Tr. 2182.) The dues paid by a POBPA member are $17.50 per lane per year, and this covers the dues for the WSBPA and BPAA as well. (Tr. 355.)

There are 20 establishments in the Greater Tacoma area. (DX A-8.) Seven of these, having 58 lanes total, started in or before 1951. By 1958, seven houses had been added, totaling 132 lanes. In 1959, two new 24-lane houses were installed, one being Pacific Lanes, and one of the older houses added four lanes, a total of 52 additional lanes. In 1960, Bowlero Lanes with 32 lanes opened May 6, and

Pacific Lanes added 12 lanes in September. In 1961, two new houses were opened, totaling 48 lanes, including New Frontier Lanes on September 22, with 32 lanes. Midway Bowl with 12 lanes closed in the fall and moved to New Frontier. No new house has been installed or lanes added to an existing house since 1961. In 1962, six lanes were removed from an older house. In January 1964, Lakewood Lanes with 24 lanes burned down. (DX A-8.)

Of these 20 houses, two of them are in King County and are not in the POBPA's area and two of them no longer are in business. Of the 16 houses remaining, five houses having 80 lanes are not POBPA members, including Pacific Lanes which resigned in October 1960, and 11 houses having 278 lanes are members. Thus, about 23% of the lanes are not in membership. (DX A-8.)

Membership in the WSBPA has been open to any proprietor who applied (Tr. 409, 2410), and individual proprietors so testified as to their individual cases. (Tr. 2339, 2365-6.) Membership in POBPA has also been open to any proprietor in Pierce County wanting to join and able to pay the initiation fee of $100 per lane. (Tr. 355, 1835-7.) Those who applied were promptly admitted. (Tr. 1058, 1746, 1835, 2430.) The same open membership policy has applied in other local BPA's in Washington. (Tr. 2366, 2430.)

There was evidence regarding the application of Seeoma Lanes in Federal Way, Washington, for membership in POBPA, some to the effect that its membership was delayed because there had been objection by some proprietors that the building of Seeoma caused an "overbuilding" or oversupply of lanes in its area. (Tr. 242, 732-4, 756, 1610-2, 1629, 1631-3, 1678, 1685-6; PX 29, 30, 34 and 63.)

There was also evidence that Secoma was not located in the POBPA territory but was in King County, that its application to join POBPA was referred to the King County BPA because of American Bowling Congress matters, that membership in the King County BPA was promptly granted, and in effect that there was no particular delay from the time Secoma applied until it received membership. (Tr. 242, 260, 747, 1637, 1826-30, 2412.) One of plaintiff's witnesses, Mrs. Coles, secretary of the state women's bowling association, testified the Secoma application had originally been referred to the POBPA and then was referred back to Seattle because of the manner in which the men bowlers were assigned to a city association. The proprietors had nothing to do with it. The ABC controls it. (Tr. 260.)

Manufacturers: The two major bowling manufacturers or suppliers in the United States are the Brunswick Corporation and American Machine and Foundry (AMF). (Tr. 150.) Brunswick is located in Chicago, Illinois, and has a factory in Muskegon, Michigan. AMF is located in the New York City area and has a Chicago sales office. (Tr. 140-1.) Both companies maintain branch managers in the State of Washington, whose territories include the adjacent states. (Tr. 266, 1675.) The two manufacturers have done most of the bowling supply business in Washington and have been approximately equal in sales. (Tr. 273, 1676.) Bowling proprietors are the customers of each. (Tr. 267.)

Substantially all of the pin-setting equipment and furniture used in bowling establishments, as well as some of the bowling supplies, such as balls, bags, and shoes, stocked and resold by proprietors, is manufactured and produced in states other than Washington and shipped into Washington by the manufacturers. (R. 162; Tr. 267-8, 271.) In

1962 AMF sold $429,000 of bowling supplies in Washington and in 1963, $493,000. (Tr. 267.) In the years 1959 through September, 1964, about $1,830,000 has been paid to AMF by proprietors in Washington to put in lanes. (Tr. 270.) AMF both sells and leases pin-setters. If leased, the proprietor pays ten cents per unit of 11 frames, or line, as rent on the first 10,000 lines bowled per lane and a decreasing rental figure as the amount of lines bowled increases per lane, with a minimum rental of $800 a year. (Tr. 271-2.) AMF has a total of 1,764 pin-setting machines in Washington, of which 1,430 are leased. The total minimum rental received by AFM per year from pin-setting machines in Washington in 1964 was about $1,144,000. (Tr. 272-3.) These payments are sent by the proprietors to AMF's office located on Long Island, New York. (Tr. 273.)

Bowlers: Bowlers primarily engage in, and bowling proprietors derive their income primarily from, open play and league bowling. "Open play" refers to the patronage of individual bowlers competing among themselves. "League play" refers to organized leagues of bowlers consisting of competing teams of up to five members per team and up to five to eight teams per league. Leagues ordinarily bowl one night per week at a scheduled time during a season of from 32 to 36 weeks per year. (R. 163.) League bowling accounts for about half of the total revenue of commercial bowling establishments. Each year, approximately 7,000,000 men and women engage in league bowling in the United States. (R. 95.)

Plaintiff called a number of individual bowlers as witnesses. As they indicated, their bowling is not their occupation or business. Their occupations included all kinds of work, such as housewives, pressmen, garage owners, a longshoreman, salesmen, civil service employees, a

fireman, a glazier, a railroad brakeman, a truck driver, and a plywood worker, as well as retired persons. (Tr. 441, 459, 472, 479, 487, 497, 507, 517, 530, 538, 626, 635, 646, 657, 663, 671, 678, 684, 688, 703, 712, 722, 766, 771, 776, 816.)

Of the approximately 36 million Americans who bowl each year, about 5 million to 7 million male bowlers are members of the American Bowling Congress (ABC). (Tr. 142.) About 3 million women bowlers are members of the Women's International Bowling Congress (WIBC), the counterpart to the ABC. (Tr. 227-8.) The ABC prescribes the standards for lanes, equipment and scorekeeping, as well as the rules for playing the game and for tournaments. (Tr. 2394-5.) To become an ABC member, the male bowler has to be a member of an ABC sanctioned league bowling in an ABC certified bowling establishment. (Tr. 79-82, 92, 106.) In order to be sanctioned by the ABC, a league must abide by ABC rules having to do with the regulation of league bowling. (PX 239.) Non-ABC members are not permitted to bowl in ABC tournaments or sanctioned leagues. (Tr. 105-7, 2385-6; PX 239.) Members who bowl in non-sanctioned leagues or tournaments are subject to suspension for at least six months, are disqualified from bowling or holding office in a sanctioned league, and forfeit their winnings. (PX 239.) It is up to the member to ascertain whether the league is sanctioned. (PX 239.) The ABC suspends members who violate its rules. (Tr. 1532; PX 239; DX A-68.)

There are associations or chapters of ABC and WIBC members in Washington. The Washington State Bowling Association has approximately 100,000 members (Tr. 76) and the Washington State Women's Bowling Association has about 74,000 members. (Tr. 228.) The Greater Tacoma Bowling Association (GTBA) is one of 2,500 city associ-

ations of ABC members. (Tr. 75.) It has about 10,000 members. (Tr. 76.) There is also a WIBC chapter in Tacoma. (Tr. 91.)

Economic Conditions.

The period 1955-59 witnessed the greatest growth in bowling. (Tr. 1595-6, 1923-4.) Both the demand for bowling and the supply of bowling establishments grew. (Tr. 1923-4.) Both league and open bowling were very good. (Tr. 1598.) Bowling was "booming" in 1958. (Tr. 415.)

In the period 1959-62, conditions changed. Nationally, the industry is now in a depressed condition. (Tr. 1595-6.) The supply of establishments continued to grow but the demand leveled off with the result that in the 1960's, the industry as a whole has been in dire straits. (Tr. 1924.) There has been a vast drop in open bowling and no corresponding increase in league play. (Tr. 1595-8.) About half of the establishments have been non-profitable, the other half enjoying only a low rate of profit. (Tr. 1925-6.) The bowling manufacturers have suffered a sharp drop in the value of their stock on the stock exchange. (Tr. 1595-7.) The industry is a striking example of what happens to an industry which becomes popular and builds a large number of establishments to answer demand and then becomes overbuilt and the profit rate falls dramatically. (Tr. 1927.)

These conditions are as true in the State of Washington as they are nationally. (Tr. 1925-6.) AMF's sales of pinsetters and lanes in Washington dropped sharply. (Tr. 268-9, 271, 299.)

These depressed conditions are reflected also in Tacoma and are probably aggravated a little more there (Tr 1595-6.) The expansion of bowling establishments has

almost trebled. For every lane in Tacoma in 1954, there were 3,172 people in Pierce County and 1,547 in Tacoma, whereas in 1964, for every lane there were 1,206 and 526 people respectively. (Tr. 1437-9.) The supply of bowling establishments exceeded the demand to the extent that individual establishments have suffered. (Tr. 1595-7.) The proprietors' peak business was in the 1961-62 season. Up to that time, their business had increased year by year. Since then, bowling has been on a decline. (Tr. 1440-1, 1924-8.) This has been true at Pacific Lanes as well as other establishments. (Tr. 1941.) There has been a lessening of interest in bowling, including league bowling. (Tr. 1748.) New establishments have gained business at the expense of the older ones. (Tr. 1317-8, 2511-2.) One Tacoma proprietor, now out of business, testified that his business went down as new establishments came in and that the competition was between new and old houses and not between members and non-members of the POBPA. The older houses did not have the automatic pinsetters and could not keep up. (Tr. 439-40.) One establishment dropped its POBPA membership because it could no longer afford to belong. (Tr. 409.)

Pacific Lanes.

Plaintiff's bowling establishment was opened for business in October 1959. (Tr. 336.) It is owned by Charles Hoffman, his wife, and their attorney. (Tr. 336.) James Stevenson was one of the original partners but his interest was purchased by Mr. Hoffman in April 1962. (Tr. 336, 945.)

When opened, the house had 24 lanes. Twelve lanes were added in its first season. (Tr. 338, 1123.) As such, it is the largest establishment in Tacoma. The next two in number of lanes are 32-lane establishments, Bowlero Lanes and New Frontier Lanes.

Shortly after it opened, in December 1959, Pacific Lane applied for membership in POBPA and was admitted a the Association's next meeting about a week or two later (Tr. 581, 1692, 1835.) Hoffman testified they joined be cause they were new in the business, it seemed like all th other houses belonged, and it appeared to be the prope thing to do. (Tr. 1193.) Both Hoffman and Stevenso attended almost every meeting of the POBPA (Tr. 43 958, 1116), and participated in its business until Pacif Lanes resigned in October 1960. Hoffman was at ever meeting. (Tr. 1116.)

Pacific Lanes has been and is successful. (Tr. 138 2389-91.) It has a good location and is equal to any hous in town. (Tr. 105, 320.) One witness said it was bett than the other establishments. (Tr. 1451.) It has been "top customer" of AMF ever since it opened. No on does more business. (Tr. 295, 471.)

Ninety-nine point nine percent of Pacific Lanes' bus ness comes from Pierce County. (Tr. 1182-3.) No bowle from out of state bowl in its leagues. (Tr. 1182.) M. Hoffman testified Pacific Lanes does not compete wi other houses in Tacoma except those located near it. (T 1182.)

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at the trial in the instant case (over four years later), *i.e.*, that the league secretary told them he had notified Villa and that they thought this was all the notification to Villa which was necessary. After the meeting, Hoffman and Stevenson were notified Pacific Lanes had been suspended for two years with the alternative of paying a $1,000 fine in lieu of the suspension. They were advised there was an appeals procedure available, but decided not to appeal or to pay the fine and, instead, to withdraw or resign from POBPA, which they did later in October 1960. (Tr. 370, 581-3, 966-72, 1003-4, 1126, 1704, 1719, 1933-4, 2114-5, 2170, 2210-8.) At the same meeting, a similar complaint was heard against Bowlero Lanes. (Tr. 1169.) Hoffman testified that at the meeting he and Stevenson did not object to lack of notice of the meeting or to the manner of conducting the meeting (Tr. 1168), although he did voice these objections at the trial.

Pacific Lanes publicized the fact it had resigned and indicated it was proud that it was no longer a member. (Tr. 1745, 2179.) It then sponsored a bowling team called "The Outlaws" which got a lot of publicity. (Tr. 2115.)

Shortly afterwards, Pacific Lanes was asked to rejoin the association but did not do so, and has never rejoined. (Tr. 1004-5, 1618-20.) There was evidence that Hoffman stated as the reason for not rejoining that "we are doing so well out of it we can't afford to." (Tr. 1620.) Hoffman testified that he did not recall making that statement (Tr. 1194) but that he has said Pacific Lanes was doing well. (Tr. 2451.) Other witnesses testified to statements by Mr. Stevenson after Pacific Lanes dropped its membership that Pacific Lanes was doing better than before and that it did not need the association. (Tr. 2158, 2349-51.) Stevenson testified he did not believe he said Pacific Lanes

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was making more money while out of the Association, but it is possible he said they could not afford to go back into the Association. (Tr. 1005-6.) Stevenson always felt his business was good in comparison with other houses in his locality. He quoted lineage figures showing they had very good business. (Tr. 2387-91.)

Bowling Tournaments.

The ABC and its affiliated state and local associations, the BPAA and its state and local affiliated associations, as well as individual proprietors, independent tournament promoters, bowling equipment manufacturers, and numerous industrial or commercial enterprises, conduct bowling tournaments. (R. 163; Tr. 145, 2206-7.) Tournament bowling is that type of bowling done by individuals or teams, or combinations of both, in a prearranged contest in which participants generally compete to determine the highest score for prizes in cash or cash and trophies. Tournament entry fees are ordinarily paid by the individual bowlers and teams, and fees for use of the bowling lanes may be paid. (R. 163.)

The GTBA conducts three tournaments a year in Tacoma. (Tr. 91.) The Women's Bowling Association in Tacoma also has an annual tournament. (Tr. 91.) These tournaments are open to all members of the respective bowling associations. (Tr. 79-82, 91.) A bowler has to be a member, however, in order to be eligible for such tournaments. (PX 239, 240.) According to the GTBA Secretary, the reason for this is that non-members should not be entitled to the same benefits as members, and one benefit of ABC membership is its tournaments and other prizes. (Tr. 106-107.)

Both the ABC and the WIBC attempt to keep track of their respective members' scores and standings in order to maintain handicaps for bowling tournaments. (Tr. 142, 1872.) Some ABC city associations publish yearbooks in which they include averages of their member bowlers. (Tr. 88-89.) The GTBA does not have a yearbook but maintains in its files the information which corresponds to the contents of yearbooks and is available to those who wish to inquire. (Tr. 89, 107.)

Mr. Seehausen, Executive Secretary of the BPAA, testified that the basic purpose of a tournament is the promotion of the game and to provide competition for people interested in the game, as well as to create an interest in the game, just as in the case of any other business which puts on a sale or promotion to stimulate interest and trade. (Tr. 143, 385.) A tournament is one way to promote the game in general and to keep interest in it alive. It stimulates interest in competition and is an attraction for nonbowlers as spectators. (PX 227; Tr. 2098.) It is also a way of thanking customers for their patronage. (PX 182, 227.)

BPAA has eight annual tournaments which are held in different principal cities throughout the United States. (R. 95-6.) A number of them involve local elimination or qualifying events. Those that have such events are held in most states although some are not. The principal BPAA tournament, the All-Star Tournament, has qualifying events held in most states. (Tr. 144-5.) In 1963, BPAA awarded approximately $365,000 in prizes for its annual tournaments. (Tr. 145, 2746.) Two of these tournaments are partly conducted each year in the State of Washington. (R. 95-6.)

In general, only a small number of bowlers (Tr. 1839, 2328-9), usually the better than average bowlers, want to compete in tournaments. (Tr. 365.) There is only limited participation in national tournaments. (Tr. 2125.) Only five to ten percent of all bowlers bowl in tournaments in Washington. (Tr. 2116.) Participants in tournament bowling are generally members of one or more leagues. One of the principal inducements to any bowler to participate in organized league bowling is the prospect of participation in one or more bowling tournaments. (Tr. 143.) In recent years, about 500,000 league bowlers have participated annually in BPAA national tournaments. (Tr. 2746.)

In 1962, a state elimination was held in Washington in which 40,830 men and women bowlers participated and they bowled 152,250 lines in the course of the elimination. (Tr. 2118.) An article in the April 1963 issue of BPAA's publication, *The Bowling Proprietor,* described the benefits of this particular national tournament as "something 'extra' for bowlers who do their bowling in member establishments," as well as an extra promotion vehicle for members and proprietor associations, a means for improved bowler relations, and a lineage builder for each BPAA member. (PX 261-R.)

BPAA has generally suffered a deficit in its national tournament program. (Tr. 2097-8, 2147, 2277.) Part of its dues income is earmarked for its tournament program. (Tr. 2147.) There is evidence that proprietor association tournaments generally are not profitable. (Tr. 1543, 1664-5; PX 225.) The WSBPA tournaments cost that association money each year. (Tr. 2409.) However, the proprietor in whose establishment a tournament is conducted benefits from the lineage bowled by the participants. (Tr. 1665-6, 2119-22; PX 153.) This is another

reason for a proprietor to have a tournament (PX 227), although it is offset at least to some extent by that proprietor's costs in promoting and conducting the tournament. (Tr. 2123.)

The WSBPA sponsors about six tournaments a year. (Tr. 1541-2.) The proprietor in whose establishment the tournament is placed is responsible for screening entries, assisted by the WSBPA Tournament Committee and its Executive Secretary. (Tr. 1542.) These tournaments are primarily publicity vehicles and, overall, do not make a profit for the Association. (Tr. 1613; PX 225.) In recent years, tournaments have been on a decline in Washington. (PX 225.)

Tournament Eligibility Rules.

Plaintiff alleged a part of the claimed conspiracy was the adoption and enforcement of eligibility rules for tournaments sponsored or conducted by proprietors' associations, which made ineligible therefor any bowler who bowled in a non-member establishment.

Prior to June 1951, the only requirement for eligibility to participate in a BPAA tournament was that the bowler had to be an ABC member. (Tr. 201.) In June 1951, the BPAA adopted a rule that in order to be eligible to participate in its All-Star Tournament the bowler had, in addition, to do all his ABC sanctioned league bowling in a BPAA member proprietor's establishment. (Tr. 202-3.) A few years later the rule was expanded to apply to the other BPAA tournaments. (Tr. 203.) Under this rule, a bowler participating in a league in a member house was not eligible to compete in BPAA tournaments if he also bowled in a league in a non-member house. (Tr. 204-5.)

In June 1960, the rule was expanded to include tournament as well as league bowling. However, the rule expressly provided that participation in the annual tournament of any ABC or WIBC affiliated association did not affect eligibility. At that time, the rule was also changed to include advertised exhibition bowling. Thus, at that time, to be eligible for a BPAA tournament, the bowler had to do all his league and advertised exhibition bowling, and non-ABC or non-WIBC tournament bowling, in member houses. Prior to June 1960, the BPAA eligibility rule applied only to BPAA tournaments and qualifying events. At that time, and until June 1961, the rule was made applicable to any tournament conducted by any association affiliated with the BPAA, including any tournaments conducted by either the WSBPA or the POBPA. (Tr. 206, 209, 211-3; R. 163-4.)

In June 1961, the BPAA rule was again changed. The advertised exhibition provision was dropped and each affiliated association was again free to adopt its own eligibility rule for its own tournament, and the rule thereafter applied, as before, only in BPAA national tournaments and qualifying events. (Tr. 216-7.)

The BPAA rule was again changed in September 1963. Thereafter, participation in BPAA national tournaments and qualifying events was offered to all bowlers who participated in the regular bowling program of any organized league bowling in any BPAA member establishment. The term "regular" was defined as bowling in at least two-thirds of the scheduled games of a league at the time of entry into the tournament. Bowlers not otherwise eligible could apply to BPAA for eligibility consideration. (R. 164-5.) Proprietors and employees of non-member establishments have never been eligible to compete. (R. 164; Tr. 222-4; PX 143, 228.)

In and after 1959, the WSBPA also had an eligibility rule applicable to tournaments conducted or sponsored by it, which in substance provided:

> "This tournament is restricted to bowlers who do their league and tournament bowling exclusively in member BPAA houses. Proprietors, stockholders, and employees of non-member houses are not eligible to compete under any circumstances. It is the bowler's responsibility to ascertain if the establishment where he bowls is a member in good standing of the BPAA and he personally meets all eligibility requirements of this tournament." (R. 164.)

On May 10, 1963, the WSBPA changed its eligibility rule to read as follows:

> "If a bowler does his sanctioned ABC and WIBC bowling exclusively in WSBPA establishments, he is eligible to participate in this tournament upon presentation of his certified average card signed by the establishment manager or his authorized representative. The bowler shall otherwise obtain his certified average card from the WSBPA Tournament Eligibility Committee in accord with its rules. Proprietors, stockholders and employees of non-member establishments are not eligible to compete. It is the bowler's responsibility to ascertain if the establishment where he bowls is a member in good standing with the BPAA and that he personally meets all eligibility requirements of this tournament." (R. 165; Tr. 375-384.)

There is no evidence that BPAA had anything to do with the adoption, terms, or enforcement of the WSBPA rule.

Reasons for the Eligibility Rules.

Just as is the reason for the ABC tournament eligibility rule (p. 16 above), the basic reason for the BPAA eligibility rule is that BPAA tournaments must benefit the association's members and their customers who support and

finance these tournaments. Non-members and non-customers do not contribute in any way to the tournaments. (Tr. 1669-71.)

The reasons for the WSBPA eligibility rule are to stimulate bowlers' interest and participation, and to prevent cheating and to keep tournaments honest and above board. (Tr. 385-6, 1655, 1754, 1756, 1871, 2194.) The rule protects the bowler and the proprietor and provides better liaison between proprietors to get the information needed. (Tr. 2086, 2132, 2135.) A bowling proprietor is interested in the average of the bowlers wishing to compete in a tournament sponsored or promoted by the proprietors. (Tr. 109, 1840-1.) It is a general practice in well conducted tournaments to verify the averages of prize winners before awarding prizes. (Tr. 1531.) A person generally cannot participate in tournaments unless he has a certified league average. (Tr. 1840-1.)

Bowling proprietors try to operate their tournaments so that everything is honest and above board. They attempt to make every facet of the game healthy. A tournament was said to be "kind of our showcase." (Tr. 1840.) Proprietors set the rules and regulations for their tournaments on this account. (Tr. 1840, 2084.) Proprietors must also administer the ABC rules for tournaments in their establishments. (Tr. 2397.) The ABC does not assist the proprietors in this. (Tr. 2084.) The format and rules of the tournament must be laid out by the proprietor and submitted to the ABC for approval. Other than sanctioning or approving the tournament, the ABC takes no part in the event. (Tr. 1540-1.)

Professor North testified that in bowling, a sport rather than a product is sold. (Tr. 1936.) The proprietors must see that the sport has a set of standards so that unfair

advantage cannot be taken. The standards and conditions of play must be uniform for all participants. (Tr. 1936-7.) To the extent the eligibility rule is concerned with such a set of standards or rules, this is common and widespread throughout most sports. (Tr. 1937.) In a great many sports, there are conditions to be met and rules and standards the players must satisfy in order to be able to play. (Tr. 1937-8.)

"Sandbagging" is a term referring to a bowler who tries to keep his score or average down so that he will get a better handicap than he deserves and will gain a greater advantage in tournament play. (Tr. 90.) A number of the defendants testified that sandbagging was a continuing problem which the eligibility rule was intended in part to avoid. (Tr. 1529-30, 1708, 1775-6, 2082, 2163, 2360.) There was quite a bit of sandbagging before the eligibility rule was adopted. (Tr. 1024-5.) It was and is a serious problem. (Tr. 1034, 1708-9, 2270.) A "sandbagger" can ruin a tournament. (Tr. 1537, 2132, 2382.) There are many cheaters in the game. (Tr. 1529-30, 1708-9, 1756.) Entries in tournaments have been rejected in cases of "sandbagging." (Tr. 1529-30.)

Hoffman testified that sandbagging was little or no problem. (Tr. 2447-50.) He also testified that he had had one sandbagging incident at Pacific Lanes and referred it to the ABC. (Tr. 2447.) Mr. Stowe, the Secretary of the GTBA, testified that it was difficult to say whether there has ever been suspected sandbagging. However, he added that it causes concern at his Association's meetings and at ABC meetings, and that "we are constantly on the alert for intentional sandbagging." (Tr. 109-10.) The ABC has rules against sandbagging which provide for a

committee in each association for re-rating the average of any bowler who can be shown to be intentionally holding down his average. (Tr. 110; PX 239.)

Mr. Guenther testified for defendants that he was a professional bowler, president of the Northwest Scratch Bowlers Association, and promotional manager for Olympic Lanes, with considerable experience in tournament bowling. (Tr. 2379-81.) He testified that if the word gets around that sandbaggers bowl in a tournament, it hurts the tournament. The proprietors try to get a list of known sandbaggers and send it to the different houses holding tournaments. When these bowlers come in, they are rejected or reclassified. He has reclassified bowlers about six times and has not seen the eligibility rule applied very often in Washington. He thought the rule compared pretty closely to the ABC eligibility rule. (Tr. 2382-4.) They are comparable in that the bowler has to be a member of the ABC before he is allowed to bowl. (Tr. 2385-7.)

Defendant Unkrur testified that the eligibility rule was an attempt by the proprietors to try to improve a condition in the industry regarding tournaments, that they were in the position of not having any single base of action about rejecting or rating bowlers and needed more substantiation so that if they rerated a bowler they would not be subject to an action for damaging someone's reputation. (Tr. 1708.)

A witness for the plaintiff testified to a conversation he had with John Corbett, a WSBPA member, in Seattle sometime in the latter part of 1961 or early 1962. (Tr. 739.) Corbett said, according to the witness, that "the eligibility rule was developed by the membership of the Association for the protection of the people in the bowling business. . . ." (Tr. 740-1.) The witness testified that he

also had conversations with Mr. Cunningham, one of the defendants, about the purpose of the eligibility rule and the substance of what Mr. Cunningham told him was the same as what Mr. Corbett said. (Tr. 742-3.) The witness's conversation with Mr. Corbett occurred after his establishment, Secoma Lanes, had been admitted to membership in the King County BPA. (Tr. 747-8.) The witness had testified that the reason he spoke with Mr. Corbett was that he was trying to get in the BPA. (Tr. 737.)

Application of WSBPA Eligibility Rule.

The WSBPA eligibility rule was enforced. (Tr. 101-2, 313-6, 1021-2, 1028, 1037-8, 1057, 1069, 1073-5, 1079, 1654-5, 1711-2, 1754, 2196-7.) The WSBPA Code of Ethics had a provision, in effect since in or about 1957, that in conducting tournaments, the proprietor members agreed to reject all entries of bowlers bowling in leagues in non-member establishments. (Tr. 388, 391-4, 404, 2147, 2424; DX A-73.)

However, the actual number of bowlers who have been declared ineligible and refused participation in a WSBPA or local proprietors' association tournament in Washington because of the rule is not clear. Although he is secretary of the GTBA, Mr. Stowe could not put his finger on any particular bowler who had been disqualified. (Tr. 114.) Hoffman testified he did not know how many bowlers were declared ineligible because of the rule and could name only ten persons affected by the rule in addition to his witnesses in this case. (Tr. 1176, 1195.)

Proprietors testified that only a few persons were declared ineligible at any tournament at their establishments (Tr. 1711-12, 2174, 2272-73, 2354, 2360, 2383.)

One proprietor testified for the plaintiff that he lost business in his establishment because of the rule after he let his dues expire and was no longer a member of the proprietors' associations. (Tr. 791½.) Another testified to the same effect. (Tr. 749-50, 752.) Mr. Surina, another proprietor, testified he was not too successful in attracting league play to his house, the Downtown Bowl, because of many reasons. One of them is the problem that his house was not a BPA member. He also had a parking problem, an older house, and no automatic equipment. He is not a BPA member because it costs too much to join. (Tr. 331-3.)

Mr. Kennedy, another proprietor, testified his house, the Coliseum Bowl in Tacoma, was in very run-down condition, only semi-automatic when he purchased it in 1958. It had no league play and open play was down to 30 lines a day. He became a BPA member about a year after this. In the meantime, he had built the business up, had several leagues, and had increased his open play. (Tr. 415-9, 439.) The eligibility rule was not mentioned as an obstacle to his building up his business. About three years later, well after he joined the BPA, he went out of business. This was because of the competition between the old and new houses. "We just couldn't keep up with them." (Tr. 440.) Since he was then a member, the rule apparently did not succeed in keeping him in business.

Another proprietor witness for the plaintiffs, who has never been a BPA member, testified the rule had no effect to speak of in her establishment. (Tr. 806.)

Fourteen witnesses testified for the plaintiff that they had been declared ineligible because they did not satisfy the eligibility rule as a result of their bowling in a league or leagues in Pacific Lanes after the 1960-61 season. (Tr. 317-23, 473, 475, 490, 500-2, 510, 518, 532, 665-7, 680, 690, 771, 776, 812.) However, most of these witnesses con-

tinued to do their league bowling at Pacific Lanes regardless that this meant they were not eligible for proprietors' tournaments. (Tr. 473-6, 490, 504, 665-8, 683, 688, 703, 771, 785, 816.) Some testified they bowled at Pacific Lanes because of the rule. (Tr. 771, 785.)

One effect of the eligibility rule is that bowlers wanting to participate in proprietor association tournaments were attracted to member establishments. (Tr. 387-8, 447, 679, 705.)

On the other hand, there is also evidence that non-member proprietors were successful in building leagues in their houses (Tr. 439), and that as a non-member of POBPA, Pacific Lanes was also successful in forming leagues after the 1960-61 season. Pacific Lanes had more leagues at the time of the trial than it had when it was a member. (Tr. 1184.) Mrs. Adams testified for the plaintiff that she was able to form a "nice league" of ten teams at Pacific Lanes in 1962. (Tr. 446-7, 458.) Another of plaintiff's witnesses testified similarly about a league in the 1964-65 season. (Tr. 465-8, 470.) Other of plaintiff's witnesses testified that there are many housewives' leagues at Pacific Lanes (Tr. 691) and that there was always someone waiting to get in the women's leagues at Pacific Lanes. (Tr. 534.) Defendant Redig testified some of his leagues at Bowlero Lanes moved to Pacific Lanes. (Tr. 1743.) This was corroborated as to at least one such league. (Tr. 1375.) The rule did not prevent Pacific Lanes from obtaining its initial leagues and business when it first opened, prior to becoming a POBPA member. (Tr. 1187, 1375.)

There is evidence that the eligibility rule had some effect on increasing POBPA membership. (Tr. 231, 363-4, 419.) However, the rule had nothing to do with Pacific Lanes becoming a member. (Tr. 1193.) Mr. Hoffman testified

he never heard of the eligibility rule until after Pacific Lanes resigned. (Tr. 583, 1187-8, 1193.) He could recall no discussion about the rule at POBPA meetings. (Tr. 1187-8, 1193.)

Although none of this was in any way connected with Pacific Lanes, there are some Canadian bowlers who travel from British Columbia to bowl in tournaments in Washington. Over defendants' several objections, particularly hearsay (Tr. 1092-8, 1109-10, 1242), the Court permitted a witness for plaintiff, Mr. Grant, to testify that about 3,000 Canadian bowlers cross the border to bowl in tournaments held in Washington each year and that this "traffic" has been "down considerably" since 1963 because of the eligibility rule. (Tr. 1086-7, 1089, 1092, 1095-7, 1107.) As we note below, Grant's estimate was incompetent and should not have been admitted.

Mr. Kuckenbecker testified for defendants that he is not connected with tournaments run by the defendants, that he conducts tournaments in Washington as his profession, and that he has conducted tournaments in Seattle, Vancouver, Spokane and Bellingham. (Tr. 2302-3, 2308.) Over 7,000 individual bowlers participated in the All-Coast Tournament in the 1963-64 season, a team tournament not sponsored or conducted by any BPA, which is the third largest tournament in the United States, held at Vancouver, Washington. Of these, 135 or 140 (or about 2%) were Canadians (Tr. 2303-6), about 40-45% were from Washington, about the same percentage from Oregon, about 2% from California, and the rest from elsewhere. (Tr. 2315-6.) This tournament has both scratch and handicap events and lasted 11 months. (Tr. 2303.) Mr. Kuckenbecker estimated about 300 Canadians bowl each year in tournaments in Washington.

(Tr. 2310.) They do so more than once so they probably account for a total of 1,000 entries. (Tr. 2313.) He never enforced the eligibility rule on Canadian bowlers (Tr. 2311), and never enforced it at all except in the case of 15 bowlers from Montesano, Washington, in the All-Coast Tournament. Here, however, he sent them applications for the eligibility card and they returned them and then bowled in the tournament. (Tr. 2311-2, 2317.)

One of the defendant proprietors testified a "very liberal" number is 150 or 200 Canadians per year. (Tr. 2107-8.) Other proprietors testified to exceedingly small numbers of Canadian bowlers participating in their house tournaments in Washington. (Tr. 2347, 2358-9.)

There was testimony from plaintiff's witnesses about individual instances where bowlers sought to apply for a certified average card or "eligibility waiver" under the provisions of the 1963 WSBPA rule, but were unsuccessful for several reasons: application blanks were not available (Tr. 570, 641, 722, 785, 885), or they were too much bother and too difficult to fill out. (Tr. 454-5, 503, 660, 879.) One said he had not been told about applying for the card. (Tr. 477-8.)

On the other hand, some of plaintiff's witnesses testified they bowled in tournaments without getting the certified average card, even though they were otherwise ineligibile, or that they had no trouble getting the card within 2-3 days. (Tr. 814, 886-7.) Mr. Corbett, current WSBPA president, testified the certified average card was absolutely not a device to keep people from bowling in a non-member house. (Tr. 379-80.) James Gaines, chairman of the WSBPA tournament committee (Tr. 1765-6), testified that his committee has functioned with regard to the eligibility rule

since the summer of 1963. Since then, it has processed applications for certified average cards of bowlers otherwise not eligible, who wished to participate in WSBPA member house tournaments. About 5 of 35 applications have been rejected, because not properly filled out or received too late. The other applications were granted and the cards issued. He could not recall any instance where the committee's action on the application and the issuance of an eligibility card has taken longer than ten days in practice. (Tr. 1771-2, 1778.)

Prices.

Plaintiff also alleged as a part of the alleged conspiracy an agreement by the defendants and others, including BPAA, to fix and stabilize prices charged for bowling. Plaintiff claimed no injury on account of this part of the alleged conspiracy. (Tr. 1176.) Consequently, to the extent necessary to this appeal, we treat the evidence concerning prices in the Argument.

Overbuilding.

Another part of the alleged conspiracy is the alleged agreement of the defendants and others, including BPAA, to limit and restrict the number and size of establishments by preventing persons from building and by soliciting the manufacturers and others not to deal with such persons. Since plaintiff expressly disclaimed any injury to its business on account of this part of the alleged conspiracy (Tr. 170, 176, 1175-7, 1248-9, 2043-8), we shall, to the extent necessary to this appeal, review this part of the evidence in the Argument.

Alleged Damages.

Notwithstanding allegations in its complaint, plaintiff acknowledged at the trial that its alleged damages were based solely upon the loss of profits because of the alleged effect of the eligibility rule.

Mr. Hoffman testified since the end of the 1960-61 season, Pacific Lanes' business has decreased each year. In the three seasons since then, no league has moved into Pacific Lanes from another house. (Tr. 1127-1147.) They have advertised and improved the appearance of Pacific Lanes. (Tr. 1127-9.) After withdrawing from POBPA they had two tournaments to promote business. Neither was a success financially. One was not subject to the eligibility rule but it still was a loss. (Tr. 1129-30.) He also testified Pacific Lanes lost five leagues due to the eligibility rule and that he made a computation of the loss of profits from that cause. (Tr. 1130.) He included in his computation only the leagues that "definitely pulled out that we had spots available for" for which the eligibility rule was the reason given by the league secretaries. (Tr. 1131-2.) This evidence is reviewed below.

Over defendants' objections that plaintiff was not entitled to recover for damages sustained after the complaint was filed, on December 6, 1961, the Court permitted plaintiff to introduce evidence of alleged losses in profits suffered in three bowling seasons, 1961-2, 1962-3, and 1963-4. Plaintiff's exhibit 259 calculated the items and net amounts of alleged lost profits, as follows:

League and Tournament	*Loss*
1961-62	
City tournament	$ 2,408.93
Invitational league	1,731.84
Total	4,140.77
1962-63	
Invitational league	1,731.84
Women's invitational	1,731.84
Tacoma commercial league	1,731.84
Plywood league	1,231.88
Total	6,427.40
1963-64	
Invitational league	1,797.12
Women's invitational	1,797.12
Olympic league	2,164.80
Plywood league	1,284.10
Total	7,043.14
Total — three seasons	$17,611.31
Other	
1961-62	
Day league, open play and other	$10,834.56
1962-63	
Day league, open play and other	10,834.56
1963-64	
Day league, open play and other	10,834.56
Total — three seasons	32,503.68
Grand Total	$50,114.99

The evidence respecting each of these items is as follows:

1961 City Tournament: Pacific Lanes was awarded the annual GTBA city tournament held in February 1960. According to Hoffman's own testimony, this was the same tournament for which some proprietors, including Hoffman, agreed to submit identical bids. See p. 88 below. In any event, about 3,000 bowlers in 592 teams bowled in the 1960 tournament at Pacific Lanes. (Tr. 92-93.)

The 1961 city tournament was also awarded to Pacific Lanes, some months after it resigned from the POBPA. About 350 teams bowled that year. (Tr. 93-94.) According to Mr. Stowe, the drop in teams was caused "practically all together" because Pacific Lanes was not a POBPA member. (Tr. 94.) In addition, there was an effort by POBPA members to persuade bowlers not to enter the tournament and none of the proprietors sponsored teams for the tournament. (Tr. 95, 98-100.) Plaintiff offered evidence that proprietors told bowlers about the WSBPA eligibility rule and that if they bowled in the tournament, they would lose their eligibility to bowl in proprietors' tournaments. (Tr. 481, 559-68, 647-9, 653, 655, 671-2, 767, 1136; PX 105.) The BPAA eligibility rule did not apply to the tournament because the rule expressly provided that bowling in an ABC or WIBC city association tournament would in no way affect eligibility. (R. 164.)

The awarding of the tournament to Pacific Lanes in successive years was the only time the same house had the tournament twice in a row. (Tr. 435, 653-4.) Many bowlers as well as proprietors complained about this. (Tr. 2088, 2262.) Bowlers who bowled in the 1960 tourna-

ment testified they refused to enter the next year because it was the second year in a row in the same house. (Tr. 2261-2, 2320-1.) The proprietors refused to sponsor teams in the 1961 tournament on this account and did not publicize the tournament in their establishments. (Tr. 2089, 2175.)

Alleged Loss of Leagues: Leagues are organized by the efforts of proprietors and interested bowlers, and have league secretaries who make arrangements for times and places for the league's bowling and obtain other interested bowlers as members to fill out the league's personnel. (Tr. 446-7, 458, 705.)

Some of the characteristics of leagues, at least in the Tacoma area, are that between seasons, leagues move from one establishment to another and have a turnover in members. (Tr. 413, 524-6, 1014, 1164, 1179, 1617, 1743-4, 2103.) Mr. Stevenson testified it was not uncommon for a house to have a 30% turnover in leagues from one season to another. (Tr. 1014.) A larger house may lose as many as six leagues. (Tr. 1617.) A loss of four or five is not uncommon. (Tr. 526, 1743.) The turnover in personnel from one season to another is as high as 35-45%. (Tr. 525, 1744.)

Some of plaintiff's witnesses testified to various reasons why people would not bowl in a particular league, apart from the alleged effect of the tournament eligibility rule. These reasons included inconvenience, wrong day or time of day, engaged in another league or leagues, the bowler is cutting down on his bowling, the establishment is not in the bowler's part of town, or lack of interest in the league itself. (Tr. 447-8, 676, 705-11.)

Pacific Lanes has 30-some night leagues and a total of 58 leagues day and night. (Tr. 1147-8.) They formed or built 50 of them since they left the association. The other

eight came from existing houses while they were still in the association. (Tr. 1148.) It has been successful in building leagues. Hoffman admitted Pacific Lanes was successful forming leagues and could have more leagues as of the time he testified than when it left the association. (Tr. 1150, 1152, 1184.) Hoffman did not believe this was a factor in determining his alleged damages. (Tr. 1184.)

The evidence is as follows respecting the leagues allegedly lost by Pacific Lanes:

Pacific Invitational League: This league was a scratch league of better men bowlers invited to participate which bowled at Pacific Lanes on Wednesdays at 9:00 P.M. in the 1960-1 season. It had 8 teams of 5 men each. A meeting of the league was held at Pacific Lanes in August 1961 to discuss the coming 1961-2 season. Mr. Stevenson and Mr. Tadich were there at the time. Tadich told some of the bowlers he wanted them to come to his place and stressed the eligibility rule. He said if they bowled at Pacific Lanes they wouldn't be eligible for tournaments. After that, the league had two more meetings. Each time there were fewer bowlers and it finally disbanded and broke up. (Tr. 461-4, 637-9, 973-81, 1189.) Mr. Stevenson testified, over objection, that the league voted to bowl at Pacific Lanes provided it rejoined the POBPA. (Tr. 973-4, 981.)

Plaintiff claimed the loss of revenue from this league for each of the three seasons. (PX 259.)

Hoffman testified he tried to revive this league and get it going and he had meetings, but it didn't happen. (Tr. 1178.) Except for this, for which no time or reason was given, and assuming the league existed in later seasons, there was no evidence that it would have bowled

at Pacific Lanes in any season after the 1961-2 season but for the eligibility rule. Hoffman testified he took the total number of bowlers in the Invitational League, and determined the total lines they would have bowled that season. Then he applied the league price per line and added in other income on the same basis as the City Tournament. Then he deducted expenses and arrived at the alleged net loss of $1,731.84. (Tr. 1138-9; PX 259.) He did the same computation for each of the next two seasons. He still had the time open for that league in each of those seasons. (Tr. 1139, 1141.) The 1963-4 season net loss is slightly higher because their league rate was raised 5¢ that year. (Tr. 1142; PX 259.)

The Women's Invitational League: Mr. Stevenson testified that he was forming this league for the 1961-2 season, and that by about 2-3 weeks before the season started, he found enough bowlers to form the league provided Pacific Lanes rejoined the association. They decided not to bowl at Pacific Lanes because it was not in the association. (Tr. 981-2.) He added that the proposed league had an organizational meeting. More than 40 girls had signed up to bowl by contacting the girl who had been elected secretary of the league. The league's rules and regulations had been formed, and the league had been formed basically since they had elected officers. Probably 20-some were at the meeting. The league was not put together. It never reached completion. (Tr. 1000-1.) Both Stevenson and Hoffman said it is not uncommon for an organization meeting to be held and a league not put together for one reason or another. (Tr. 1001, 1161-2.)

This league was to bowl at the same time as the Men's Invitational League, Wednesdays at 9:00 P.M. (Tr. 1140, 1189.) Hoffman testified that when they found out the

men's league was not going to continue at Pacific Lanes, the women went to New Frontier and started a new league there. (Tr. 1161-2.)

Plaintiff claimed the loss of revenue for this league for the 1962-3 and 1963-4 seasons. (PX 259.) Hoffman computed the loss in the same way as the Men's Invitational League. (Tr. 1140.)

There was no other evidence concerning this proposed league. Assuming it then still existed, there was no attempt by Pacific Lanes to invite the league back after the 1961-2 season and no evidence that the league refused to do so because of the eligibility rule.

With regard to both the men's and women's invitational leagues, through part of the 1963-4 season, there were not enough alleys to handle them because Pacific Lanes formed two other leagues during that season. (Tr. 1369-70, 1415-16.)

The Plywood League: A member of this league, Mr. Krick, testified it had six 4-men teams and bowled at Pacific Lanes in the 1961-2 season. He said that at the end of that season he wanted to move the league because of the eligibility rule. He and five or six of the other bowlers wanted to bowl in tournaments, and except for a couple of dropouts, the league moved to New Frontier Lanes. (Tr. 508-9, 511.) It appears Mr. Krick bowled in the league in spite of the eligibility rule since he also testified he had been declared ineligible for one tournament in the 1960-1 season because of bowling at Pacific Lanes. (Tr. 510.) The league itself came to Pacific Lanes in 1961, after it had dropped its POBPA membership. (Tr. 1178-9.)

The Plywood League still bowls at New Frontier. (Tr. 510.) There is no evidence that it was asked to come back to Pacific Lanes for a later season and refused to do so because of the rule. Mr. Krick no longer bowls in the League. (Tr. 511.) There is no evidence what happened to the rest of the members of the league. Mr. Krick added that he bowls in member houses because the proprietor tournaments are better and he wants to bowl in them. (Tr. 512-3.)

Plaintiff claimed the loss of revenue for the Plywood League for the 1962-3 and 1963-4 seasons. (PX 259.) Mr. Hoffman testified the Plywood League was included in his calculations because they voted to go to the New Frontier because of the eligibility rule. (Tr. 1140-1.) Pacific Lanes organized another league called the North Pacific Plywood League for the 1962-3 season. (Tr. 1375.) He did not testify as to his method of calculation for this league. (Tr. 1141, 1142-3.) The league bowled on Tuesdays during the day. (Tr. 1189-90.)

The Tacoma Commercial League: Mr. Kleinsasser, the secretary of this league, testified for plaintiff that in the 1959-60 season, this league of eight teams of five men each bowled at Pacific Lanes, having moved there from Lincoln Bowl the previous season. At the end of the 1959-60 season, the league voted to move to Villa Lanes because of the eligibility rule. Only six of the teams moved, since two of them would not travel to Villa. One of them moved to New Frontier and the other disbanded. After the 1960-1 season at Villa, they weren't satisfied with Villa and disbanded. It was too far to travel for some members. (Tr. 712-15.)

There was no evidence that the league was asked to return to Pacific Lanes after its season at Villa or that it refused to do so because of the eligibility rule.

Notwithstanding Mr. Kleinsasser's testimony that the league moved from Pacific Lanes at the end of the 1959-60 season, when it was still a POBPA member, plaintiff claimed the loss of revenue for this league for the 1962-3 season. (PX 259.) Mr. Hoffman testified that the Tacoma Commercial League was included in his revenue loss calculations for the 1962-3 season since they moved to Villa because of the eligibility rule. (Tr. 1140.) He did not testify as to how the rule could have caused a league to move from one member house to another, nor as to the method by which he calculated his alleged loss based on this league. (Tr. 1140.) He did not include this league in his calculations for the 1963-4 season because the spot had been filled with another league. (Tr. 1143.) In the 1962-3 season, Pacific Lanes was six lanes short of being able to accommodate this league because another league had been organized. (Tr. 1372, 1416-17.)

The Olympic League: This league moved to Pacific Lanes shortly after it opened in 1959, before it became a POBPA member. (Tr. 1375.) Mr. Ehly testified that when the league had its pre-season organizational meeting a few weeks before the 1963-4 season, he said they would have to elect someone else in his place as an officer, because he was going to drop out and not bowl at Pacific Lanes that year. Then his team decided that if Ehly wasn't going to bowl they wouldn't bowl either, and finally the league disbanded. (Tr. 520-2.) Ehly dropped out because he liked to bowl tournaments and the only way he could was by not bowling at Pacific Lanes. (Tr. 521-2.) He also had bowled in the league in spite of the rule, since he had been told as early as 1961 that he was ineligible for tournaments because he bowled at Pacific Lanes yet continued to do his league bowling there. (Tr. 518.)

There was no evidence about the numbers of teams or bowlers in this league. There is no evidence as to what the other members of the league did, other than when they disbanded they quit bowling at Pacific Lanes and moved all over town. (Tr. 522.) There is no evidence that they were asked to continue on at Pacific Lanes in other leagues and refused because of the eligibility rule.

Plaintiff claimed the loss of revenue for the Olympic League for the 1963-4 season. (PX 259.) Mr. Hoffman testified the Olympic League was included in the alleged 1963-4 season losses since the league disbanded because of the eligibility rule. (Tr. 1142.) He did not go through his calculations for that league. (Tr. 1142.)

Alleged Loss of Open Play and Other Business: In addition to the specific items of alleged damages, Mr. Hoffman testified that in each of the three seasons, Pacific Lanes suffered a general loss of profits from open play which included day leagues, open play, tournament bowling, work that league bowlers would do and the number of teams and individuals that left. He made a "conservative estimate" of this. (Tr. 1132, 1143, 1146.) He thought it could have been considerably more. (Tr. 1146.) It has been very difficult to organize day leagues. These are housewives' leagues. (Tr. 1143, 1164.) There is no evidence, however, that any particular housewives' league left Pacific Lanes.

To calculate this alleged loss Hoffman tried to break it on a per-lane basis and found a "conservative estimate" would be two lines per lane per day.

Mr. Hoffman was asked about how he arrived at the two lines per lane figure, and he testified as follows:

1156 "Q. How did you determine two lines per day per lane as being your loss of open play?

"A. I tried to break it down to a per-lane basis.

"Q. Why two lines; why not five or ten, or one or none?

"A. Five would be better.

"Q. Why didn't you use five?

1157 "A. I tried to be conservative.

"Q. Well, wouldn't it be even more conservative to use one?

"A. Probably.

"Q. How did you determine the figure, is what I am trying to find. What basis did you use?

"A. To break it down to a per-line basis?

"Q. Yes.

"A. I took a figure of an approximate amount of lineage that I thought we would lose, the amount of dollars, and broke it down to a per-line basis because your bowling rate was on a per-line basis.

* * *

"Q. What factor did you use in determining the business that you anticipated that you didn't receive?

"A. Used tournament play, for instance, practice lines, day leagues.

"Q. How were these related then to the two lines per day?

"A. They are related in the amount of dollars and the lines they would bowl, and broken down in a per-line basis.

"Q. Again, why not five lines instead of two?

"A. I just didn't think that would be fair.

"Q. And is there anything other than your speculation as to the amount of open play you would have had?

1158 "A. I have no way of proving I would have had a certain number of lines.

"Q. Do you have any way of knowing?

"A. I can only estimate.

"Q. And the figures that you have given are estimates?

"A. That is correct.

"Q. And the sole basis that you have for that is what you have now testified to?

"A. That is correct.

"Q. Are you sure that there are no other factors that were considered in your reasoning processes to arrive at that?

"A. I don't believe so."

He did not consider the business trends in bowling in Tacoma, or the population trends, or the business done by other proprietors. (Tr. 1158.) He did not know or take into consideration whether the bowling business in Tacoma has been improving or becoming worse. (Tr. 1158-9.) He did not consider the number of bowlers in Tacoma, or whether there has been an increase in bowler participation in the area, or whether there was a lack of interest in tournaments. (Tr. 1159.) He supposed there could be some connection between these factors and whether or not his business should have improved at a greater rate than it did, "if you could tie it in some way." (Tr. 1159.)

Mr. Fisher, a C.P.A., assisted Hoffman in computing damages. (Tr. 1184-5, 1211.) Hoffman supplied the information on the tournaments and leagues that were lost, number of lines bowled by each league, the number of bowlers, length of season, and league prices. Hoffman and Fisher worked together to determine the amount of other income and of expenses. Then Fisher did the com-

putation based on what Hoffman told him. (Tr. 1185, 1211-2, 1421-2.)

Hoffman testified Fisher did not make any independent investigation of the information given him. (Tr. 1185.) Fisher testified that he was asked to prepare a schedule of losses of bowling and the dollar amounts of the losses, and that he prepared PX 259. (Tr. 1211.) He said he investigated to see that there was room for the leagues on the various periods if they had come back to the house. (Tr. 1212.) What this amounted to, however, was Fisher went through with Hoffman the time periods in the various days and came up with the finding from Hoffman that there were times available for the leagues. In one or two instances leagues were formed later in the season in these time spots but there were other times available and they could just as well have gone into those spots. (Tr. 1220.) Fisher also used statistical information to see that the expenses allocated and the other income were fair. (Tr. 1212.) That is all he did independently. (Tr. 1212.) Fisher also explained how he made the calculations on PX 259. (Tr. 1215-20.) In none of the three years was the house full for the entire week. (Tr. 1220.)

On cross-examination, Fisher testified they did not take into account in computing alleged league losses that there could be no open play during that time spot. Fisher presumed Mr. Hoffman took this into account in computing the other alleged losses. (Tr. 1224.) Fisher had no knowledge whether bowlers were on the lanes when the Invitational League stopped bowling. (Tr. 1224.)

Pacific Lanes has also been successful in enlarging its open play. (Tr. 1151.) Most of the good bowlers in Tacoma bowl open play and "pot" games at Pacific Lanes. (Tr. 469-70, 640, 642, 726.) Defendants' evidence is that

there is a relationship between open and league bowling, in that as the volume of one decreases in a particular house, the volume of the other tends to increase. Thus, a drop in the volume of league bowling in a particular establishment, as claimed by Pacific Lanes, finds an increase in open bowling at that house. (Tr. 1388-9, 1458-9.) Pacific Lanes maintains records of its open play business. (Tr. 1151, 1373.) They show its open play has increased since it dropped out of the BPA. (Tr. 1388-9.) Notwithstanding this, Mr. Hoffman said he couldn't say whether it has increased since they dropped out of the association. "Maybe we increased it for a week or over a season." (Tr. 1151-52.) Hoffman was asked by his attorney whether there was ever a day when he did not have lanes available for open play and he answered: "Sometime during the day we do, yes." (Tr. 1198.)

Bowlero and New Frontier are the establishments most comparable to Pacific Lanes. (Tr. 1313-15, 1444, 1464, 1478, 1508, 1726-27, 1885-1903, 1944, 1995.) Bowlero was said to be the finest house in the State. (Tr. 2413.) Mr. Hoffman in the Fall of 1961, suggested that these three more modern houses form their own association but this was not done. (Tr. 1747.) Defendants' evidence is that Pacific Lanes' business since it dropped its membership has been substantially comparable to those two houses and better than the other older houses in Tacoma. (Tr. 1384-5, 1441-4, 1448-53, 1457-9, 1474-5.) In 1963, Pacific had fewer total leagues than Bowlero and New Frontier. (Tr. 1485.) It is the only one of the three which declined in business in both 1962 and 1963. (Tr. 1489-90.) Bowlero and New Frontier are the only houses in Tacoma which showed some increase in business in the 1961-63 period. Both increased 5% from '61 to '62. Then, in 1963, Bowlero declined to about the '61 level and New Frontier

increased a fraction. (Tr. 1507-8.) The latter house bucked the trend because it was a new house still coming into the market and it probably reached its peak in 1963. (Tr. 1946.) Professor North concluded that the entry of these two new houses into business had the effect of cutting into Pacific Lanes' business. (Tr. 1995.) Notwithstanding, Pacific Lanes earned more during the period 1960-63 than any other house and if it were to recover its claimed damages of $50,000 it would have earned more than twice as much as the next highest house. (Tr. 1386-7, 1991-2.)

Professor North also testified that in Tacoma, the bowling industry is a highly competitive industry with the three largest houses doing a little better than the rest but having a rough time of it. (Tr. 1939, 1952.) He found no evidence that any one house has been discriminated against or that Pacific Lanes suffered any loss. (Tr. 1952, 1959.)

Pacific Lanes' rental payments to AMF are down about $3,000 per year for 1962-1964, based upon a total of 118,290 lines times an 8¢ per line rate. (Tr. 1200-1.) Pacific Lanes' books and records show a greater number of lanes bowled than it reported to AMF incident to its rental payments. Hoffman said the lineage meter broke down periodically. (Tr. 1375-6.)

SPECIFICATION OF ERRORS.

1. The boycott instructions given by the Court were erroneous. After defining what constitutes an unreasonable restraint under the Sherman Act, the Court charged the jury as follows: (Tr. 2773-4):

> "There are certain agreements or practices which, because of their adverse effect on competition are conclusively presumed by law to be unreasonable; these are therefore unlawful regardless of the surrounding

circumstances. Among these practices, which are unlawful in and of themselves, are price fixing and group boycotts.

"For purposes of this case, a group boycott may be defined as the concerted refusal of a group of persons engaged in some line of commerce to deal with others—that is, to sell their goods or services to others—unless the potential customers agree that they will not do business with other firms which are competitors of the persons in the group. In other words, a group boycott is a combination of business concerns to boycott potential customers unless the customers restrict their trade and custom to the members of the group and avoid patronizing outside competitors.

"A group boycott is unlawful even though those who are parties to it claim that it was adopted for the purpose of eliminating practices thought by them to be trade abuses or undesirable trade practices."

Defendants objected to the boycott instructions on the grounds that the eligibility rule is not a boycott subject to the Sherman Act because that act relates only to commercial boycotts, and these instructions did not include defendants' theory that they have a right to establish reasonable rules to regulate their tournaments. (Tr. 2023-5, 2026-33, 2804-5.)

2. In connection with the boycott instructions, the Court erroneously refused to give the following requests of the defendants. (R. 238.)

No. 23: "Defendants have the right to adopt and enforce rules and regulations in order to regulate, standardize, and promote competition in the sport of bowling, and such regulations are not unlawful even though an incidental effect may be to restrict the business of the plaintiff."

No. 27: "If you find that the main purpose and chief effect of the eligibility rule and its enforcement is to foster the bowling business by the promotion of standardized rules and regulations regarding participation in tournaments without any unlawful intent to monopolize or restrict trade, then even though such rules or regulations incidentally restricted competition and interstate commerce, such acts do not constitute a monopoly or attempted monopoly in violation of the antitrust statutes of the United States."

3. The award of $35,000 actual damages is grossly excessive because:

(a) The Court erred in overruling defendants' objection to evidence of any alleged damages incurred after the date the complaint was filed, December 6, 1961. (Tr. 853-4, 1141.) Most of plaintiff's alleged damages occurred after the filing date. Defendants also tendered an instruction, request number 22, which was refused by the Court, limiting any alleged injury to plaintiff to the period between its resignation on October 15, 1960 to the filing date (inadvertently described as December 7, 1962 instead of December 6, 1961). (R. 69.) Instead, in accordance with plaintiff's contention, the Court instructed the jury that plaintiff could recover for damages suffered between the date of its resignation and the end of the 1963-4 bowling season. (Tr. 2782.) Plaintiff's damages should properly have been limited to those occurring before December 6, 1961.

(b) The evidence does not support the award. Both the fact and the amount of damages were based upon speculative evidence.

4. The evidence is not legally sufficient to support the verdict that either the interstate aspects of plaintiff's business or interstate commerce were affected by the eligibility rule or by any other aspect of the alleged conspiracy.

5. The Court erred in admitting Mr. Grant's testimony regarding the alleged effect of the eligibility rule on interstate commerce. Over objections that his testimony was speculative and hearsay (Tr. 1089, 1092-10, 1241-2), Mr. Grant testified that about 3,000 Canadian bowlers come to Washington to bowl in tournaments and that since 1963, this has dropped considerably because of the eligibility rule. (Tr. 1086, 1089, 1095-7, 1107.)

ARGUMENT.

I.

SUMMARY OF ARGUMENT

The Court erred in charging the jury that the tournament eligibility rule was a group boycott, and therefore, a *per se* violation of the Sherman Act. The boycott instructions were not applicable in this case. The eligibility rule is not a commercial boycott in the *per se* category. Whether or not the eligibility rule violates the Sherman Act properly depends upon the application of the rule of reason rather than any *per se* rule. The boycott instructions were clearly prejudicial because they directed the jury to find the eligibility rule to be a *per se* violation, without regard or consideration for defendants' evidence concerning the justification for and reasonableness of the rule. The error in giving the boycott instructions was compounded by the failure of the Court to give requests by the plaintiffs under which the jury would have considered the defendants' evidence in justification and support of the rule. This error also substantially prejudiced the defendants in their defense of the claimed violation of Section 2 since by the boycott instructions the jury was directed to disregard the defendants' evidence bearing upon a necessary element of

such a claim, *i.e.*, whether the defendants acted from legitimate business aims or, instead, with the specific and subjective intention to monopolize the bowling business in Tacoma.

The damages were grossly excessive. The award of $35,000 actual damages necessarily included in substantial part profits allegedly lost by the plaintiff because of acts committed after the date the complaint was filed. Plaintiff is not entitled in this case to recover any damages based upon acts occurring after the filing date. The Court erred in admitting evidence of alleged damages based upon acts which occurred after that date. In addition, and equally important, the evidence of damages is purely speculative both as to the fact of damage as well as to the amount of damage allegedly suffered.

The evidence was not legally sufficient to support the verdict that the eligibility rule had the requisite effect upon interstate commerce. The rule was not shown to have had a substantial effect on any interstate aspect of plaintiff's business, nor was it shown to have affected interstate commerce in general. The only effect the eligibility rule could have in this case is as to where local residents in Washington will pursue a part of their recreational bowling. The fact that some out-of-state bowlers may have been affected is not the direct and substantial effect on commerce which is required for a violation of the Sherman Act. In this connection, the only evidence that the eligibility rule even affected out-of-state bowlers was the testimony of Mr. Grant regarding Canadian bowlers, which was incompetent because it was hearsay.

The other aspects of the alleged conspiracy do not aid plaintiff's basic claim that the eligibility rule violates the Sherman Act. The alleged fixing of the price of bowling

is not supported by competent and sufficient evidence and even were agreements on price deemed established by the evidence, they could only be local agreements not shown to have had any effect, let alone the requisite effect on interstate commerce. The alleged overbuilding activities were not connected with the eligibility rule and were not shown to be a part of the same conspiracy as that which allegedly produced the eligibility rule. Consequently, plaintiff cannot rely on any of these other aspects as proof that the eligibility rule had the necessary effect upon commerce.

II.

THE COURT ERRED IN CHARGING THE JURY THAT THE ELIGIBILITY RULE WAS A GROUP BOYCOTT AND, THEREFORE, A PER SE VIOLATION.

The eligibility rule was the only circumstance in this case to which the boycott instructions could pertain. The effect of these instructions, set forth above (pp. 45-46), was to direct the jury to find that the eligibility rule was a group boycott and a *per se* violation, and consequently the jury had no choice but to find the defendants guilty under both Sections 1 and 2.

This was error, for several reasons: First, the instructions were not applicable in this case unless the eligibility rule was in fact a group boycott in the *per se* category. The rule is not such a boycott, and the jury should not have been instructed that it was. Second, the factual issue whether or not the evidence established that the rule was a group boycott was withdrawn from the jury. They were flatly told it was a group boycott and a *per se* violation. Third, whether or not the rule violates the Sherman Act properly depends upon the application of the rule of reason.

A. The Rule Is Not A Commercial Boycott.

It is axiomatic that there can be no violation of the Sherman Act, and its proscriptions against restraints of trade, unless a trade or business is affected. As the Restatement of Contracts states (Section 513, Comment a):

> "The term 'restraint of trade' relates to limitations of business dealings or professional or other gainful occupations. A contract restricting a promisor from playing golf as an amateur . . . is not in restraint of trade."

The Sherman Act was adopted to prevent "restraints to free competition in business and commercial transactions. . . ." *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 493 (1939).

As Judge Wyatt recently stated in *Lieberthal* v. *North Country Lanes, Inc.,* 221 F. Supp. 685, 687 (S.D. N.Y. 1963), aff'd 332 F.2d 269 (2d Cir. 1964):

> ". . . The nature of the sport (or recreation) of bowling is a well known fact of which the Court can take judicial notice."

In the *Lieberthal* case, the Court distinguished the act of bowling from the business of providing or promoting local exhibitions. Judge Wyatt said in part (221 F. Supp. at p. 687):

> ". . . Local exhibitions . . . are in any event to be distinguished from participation on an individual basis in a sports activity such as bowling, swimming, etc. . . ."

As Judge Wyatt added, the individual bowler "entertains himself; he is not entertained by the exhibition of persons or apparatus gathered in interstate commerce." 221 F. Supp. at p. 688.

Consequently, it is perfectly obvious that the act of bowling is the act of participating in a game or recreation. It is not a commercial pursuit or the transaction of a business. Except for a professional bowler, it is not and cannot be an occupation or gainful employment.

With the foregoing in mind, it is pertinent to note certain basic factors regarding the eligibility rule.

First, the rule is not a refusal to deal commercially. It is at most only a "refusal" to allow an ineligible bowler the privilege of bowling in a particular tournament as an additional part of his recreational pursuits. In itself, the ineligibility of a bowler because of the rule has no commercial ramifications whatsoever.

Second, the rule does not involve any coercive element whatsoever. Nothing in it does or could force a bowler to do something he does not want to do. Nothing in it does or could restrain the freedom of the bowler to decide independently where he wants to bowl and what kind of bowling he wants to pursue. Nothing in it forces a bowler to bowl or to want to bowl in a BPA tournament. If he wants to bowl in a BPA tournament, then he must qualify to do so, just as in any other kind of a competitive event one can imagine. If he does not want to bowl in such a tournament, that is the end of the matter. The rule is of no interest to him whatsoever. Most bowlers are in this category. If a bowler does not want to bowl in a BPA tournament enough to do what is necessary to qualify, that is also the end of the matter and the rule is of no significance to him. There is absolutely nothing the rule can make a bowler do if he does not want to do it in the first place. Whatever persuasive element the rule may have is not the kind of persuasion the antitrust laws forbid. See *Interborough News Co.* v. *Curtis Publishing Co.,* 225 F.2d 289, 292-293

(2d Cir. 1955) (where the distributors approached by Curtis are analogous to the bowlers here), and *United States* v. *General Motors Corp.*, 216 F. Supp. 362, 364-5 (S.D. Calif. 1963) (where the dealers persuaded by General Motors are analogous to the bowlers here).

Third, the rule has no application of any kind to the primary and most important parts of the sport. The proprietor's patronage is primarily from open play and league bowling. Together, these are the basic source of the proprietor's business. Any bowler is completely at liberty, indeed invited, to bowl in a member proprietor's house. There is not a shred of evidence that the rule or any other thing done by the defendants resulted in their refusing, for any reason, to allow anyone to bowl in open or league play in their houses.

Fourth, tournament bowling is an incidental part of the sport. In general, only a small number of bowlers, usually the better than average bowlers, want to compete in tournaments. Only five to ten percent of all bowlers bowl in tournaments in Washington. There is only limited participation in national tournaments. (P. 18 above.) Moreover, bowling tournaments are conducted by a myriad of sponsors in addition to proprietor associations. There are many tournaments available to the relatively few bowlers who want to include this type of competition in their bowling recreation, further indicating the incidental and narrow effect of the rule. That the rule can have only incidental and narrow effect on bowlers is significant. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 239-240 (1917).

Fifth, plaintiff's witnesses testified the BPA tournaments are the best. So be it. Defendants would not want it otherwise. To be sure, the sponsorship of the best bowling tournaments is bound to make at least some bowlers prefer

them to other tournaments and presumably make at least some bowlers want to patronize the proprietors who help make them possible. But these are but incidentals which at most could be of significance only to bowlers who are interested in tournament bowling. And the basic reason for this is not the eligibility rule, but the excellence of BPA tournaments.

The eligibility rule pertains and has significance, therefore, only to a relatively small part of the bowling public, those who want to include tournament bowling in their recreational pursuits, and then only to those desiring to compete in BPA tournaments as contrasted with the variety of other tournaments available. This part of the bowling public, and such patronage as they may bring to member houses, are only an incidental part of the sport of bowling. Furthermore, the rule has no commercial or economic aspect since it in no way affects the trade or business of those bowlers who are interested in BPA tournaments. And it has no coercive aspect, since it does not destroy, coerce, or affect the independence of bowlers to decide where they want to bowl.

B. Only Commercial Boycotts Can Be Per Se Illegal.

Boycotts illegal *per se* under the Sherman Act are *commercial* boycotts, i.e., concerted action by one trader or group of traders to force another trader or group of traders to do or refrain from doing something with respect to the latter's trade or business. As the court said in *Arzee Supply Corp. of Conn.* v. *Ruberoid Co.*, 222 F. Supp. 237, 242 (D. Conn. 1963):

> ". . . a group boycott . . . is a concerted refusal by traders to deal with other traders. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed. 2d 741 (1959). A group boycott is unlawful *per se* because it restrains the freedom of the par-

> ties to the boycott independently to decide whether to deal with the boycotted party. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211, 213, 71 S.Ct. 259, 95 L.Ed. 219 (1951). . . ."

Examples of commercial boycotts illegal *per se* are found in *Fashion Originators' Guild* v. *F. T. C.,* 312 U.S. 457 (1941), *Klor's, Inc.* v. *Broadway-Hale Stores,* 359 U.S. 207 (1959), and *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963).

The characteristics of boycotts illegal *per se* shown in the above authorities simply are not present in the eligibility rule.

Authority for this conclusion is found in *United States* v. *U.S. Trotting Ass'n,* 1960 Trade Cases, paragraph 69,761 (S.D. Ohio 1960). The government contended the rules and regulations of the Association amounted to illegal boycotts or concerted refusals to deal in violation of Section 1. The rules in question provided, in part, that horses racing on tracks which were not USTA members or in meets which were not USTA sanctioned were barred from receiving eligibility certificates, which certificates were essential if a horse was to be eligible to participate on member tracks and in sanctioned races. The District Court upheld the Association, stating:

> "Defendant's rules and regulations, singled out by the Government's motion for summary judgment, insofar as they may be called group boycotts, or concerted refusals to deal, are not such commercial boycotts as have been stricken down in previous cases as unlawful *per se.* The Court is not unmindful of *Klors, Inc.* v. *Broadway-Hale Stores, Inc., et al,* (1959 Trade Cases ¶ 69,316), 359 U. S. 207. However, the Court is of the opinion that *Klor's* is distinguishable upon its facts from the instant case in that it, too,

> dealt with such commercial boycotts. Therefore the Court finds that the Government's motion for summary judgment should be overruled."

Further support for this conclusion is found in *United States* v. *Insurance Board of Cleveland,* 144 F. Supp. 684 (N.D. Ohio 1956). With regard to certain rules of the Insurance Board, the District Court concluded that *per se* illegality attached only to group boycotts involving "coercive action against parties outside the group." (See 144 F. Supp. at pp. 696-698.) The Court stated:

> "The construction for which the Government contends holds the *dicta* to be an unqualified condemnation of all group refusals to deal, irrespective of their intent and effect and the means employed to accomplish the purposes of the combination. Within the all-embracing compass of this construction a group refusal to deal motivated by legitimate business reasons, exerting no coercion upon outsiders and resulting in no unreasonable restraint of trade, would nevertheless be a violation of the antitrust act. The Government's contention goes too far. *Under its interpretation many innocent practices of trade associations which only indirectly affect outsiders and which create no unreasonable restraint of trade would be brought within the ban of the Act* and the alleged offenders denied the opportunity to justify their conduct. Such a construction is squarely in conflict with the Rule of Reason." (Emphasis added.)

After trial, the Court rendered another opinion, again refuting the *per se* contention. 188 F. Supp. 949, 954-955 (N.D. Ohio 1960). The Court noted that after its first opinion, *Northern Pacific Ry. Co.* v. *U.S.,* 356 U.S. 1, and *Klor's Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 had been decided. After a full discussion of these deci-

sions, the Court reaffirmed its initial decision, in pertinent part stating (p. 955):

> "*Coercive economic pressure affects the degree of restraint and is frequently, if not always, a distinguishing characteristic of concerted refusals to deal that are conclusively presumed to be unlawful.* The presence or absence of such element, therefore, would seem clearly to be relevant to the issue whether the restraint of a concerted refusal to deal is unreasonable *per se* . . ." (Emphasis added.)

See also Rahl, *per se Rules and Boycotts* 45 Va. Law Rev. 1165 (1959).

C. The Boycott Instructions Were Clearly Prejudicial To Defendants.

None of the circumstances in the *per se* boycott cases can be inferred in the case at bar. As we have said, neither the bowler nor his business are coerced or threatened by the eligibility rule. By the nature of things, it is not pressure or coercion, commercial or otherwise, which leads such bowlers as do to prefer member houses. If the rule has the effect of causing a bowler to refrain from league bowling in non-member houses, it is because the bowler wants to participate in BPA tournaments and not because his independence of deciding where he will bowl is destroyed by commercial pressure. The rule is no more than the offer of contests or premiums or trading stamps to encourage people to buy certain products. Non-members are not precluded from competing in the same way, by offering tournaments available only to their league bowlers. Nor are bowlers in any way restrained from bowling in non-member houses. Bowlers lose nothing by virtue of not qualifying for proprietors' tournaments which they have any right to have, or which they "need" to have, or which has any commercial significance whatsoever, contrary to the circumstances in every illegal boycott case we know.

The rule is not even a boycott, let alone a boycott illegal *per se*. No one is or could be forced to bowl in a bowling tournament.

Consequently, the boycott instructions were inapplicable in this case and it was error for the Court to give them.

This Court stated the applicable principle concerning errors in instructions in *Sunkist Growers, Inc.* v. *Winckler and Smith Citrus Prod. Co.*, 284 F.2d 1, 23 (9th Cir. 1960) reversed on other grounds, 370 U.S. 19 (1962):

> "Appellees, of course, urge that the instructions must be 'viewed in their entirety, rather than in isolated segments'; that 'even if a single instruction is erroneous, it does not call for reversal if it is cured by a subsequent charge or by a consideration of the entire charge,' citing *Jesonis* v. *Oliver J. Olson & Co.*, 9 Cir., 1956, 238 F.2d 307, 309. We agree with that general principle, yet if a substantial and prejudicial error is made in the giving of but one instruction, the verdict cannot stand. . . . ."

The error here was patently substantial and prejudicial. The eligibility rule is the crux of plaintiff's case. The damages claimed are entirely based upon the impact of the rule on plaintiff's business. The instructions caused the jury to find that the rule was a *per se* violation and to disregard defendants' contentions and evidence that the rule was reasonable and lawful.

D. The Error In So Instructing The Jury Was Compounded By The Failure Of The Court To Give Defendants Requested Instructions.

By their requests 23 and 27, quoted above (pp. 46-47), the defendants tendered their theory with respect to the eligibility rule. Throughout the trial, they contended there were several legitimate reasons for the eligibility rule.

(Pp. 21-24 above.) Consideration of this evidence was effectively precluded by the boycott instructions given by the Court.

When requests 23 and 27 were discussed during the conferences on instructions, the Court indicated the plaintiff's requests on boycotts would be balanced by defendants' and the defendants thought their requests would be given. (Tr. 2031-2.) The record does not show any further mention of defendants' requests until the exceptions to the charge. (Tr. 2804-5.)

These requests, or the substance thereof, should have been included in the boycott instructions. Without them, the jury was not given the defendants' theory of the eligibility rule.

In *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), this Court reversed, *inter alia,* because the district court failed to give a requested instruction, and its comments are appropriate to the failure to give defendants' requests 23 and 27 in this case (327 F.2d at p. 465):

> "Lessig tendered to the court a proposed instruction concerning his right to recover reasonably anticipated future profits lost as a result of the cancellation of his lease and contract. The instruction was not given, and Lessig made timely objection. The omission was error. The error was prejudicial since the jury was instructed in detail as to Lessig's right to recover profits lost during his occupancy of the station, and therefore might have concluded that he could recover only on this theory. Such a misconception could have led to the verdict adverse to Lessig, for while Lessig's proof of causal connection between the alleged violation and the lease cancellation was substantial and direct, his proof of loss of profits from Tidewater's conduct during his occupancy of the station was, as we have said, relatively meager and tenuous."

The net effect of the refusal to give the requests in the case at bar, coupled with the giving of the boycott instructions, was that defendants could not lawfully conduct any tournament in which only their customers were eligible. An eligibility rule intended to provide tournaments for customers of the sponsor surely is not a restraint of trade. Whether or not the WSBPA eligibility rule went unreasonably beyond this was a question of fact, to be determined under the customary standard applied in antitrust cases, that the law proscribes only unreasonable restraints. See *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238-239 (1917). The reasonableness or unreasonableness of the eligibility rule was effectively withdrawn from the jury by the instructions given and by the refusal to give the defendants' requests.

E. The Erroneous Boycott Instructions Also Vitiate The Verdict and Judgment Under Section 2.

Because of the erroneous boycott instructions, defendants were also substantially prejudiced in their defense of the Section 2 charge.

Obviously, the defendants have not monopolized the bowling business in Tacoma. They do not control bowling prices in Tacoma nor have they the power to exclude anyone from entering the bowling business in Tacoma, witness the price variations and the influx of new establishments in Tacoma. Without such control and power, monopolization does not exist.

However, plaintiff claimed and the judgment below represents that the defendants attempted to monopolize the bowling business in Tacoma. This requires "proof of a specific or subjective intent" to accomplish that result. *Report of the Attorney General's Committee on the Anti-*

trust Laws, p. 61 (1955); *Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 626 (1953).

In its recent decision in *Independent Iron Works, Inc.* v. *United States Steel Corp.,* 322 F.2d 656 (9th Cir. 1963), this Court affirmed the action of the district court in directing the verdict for defendants and dismissing the action. *Inter alia,* plaintiff alleged a conspiracy and attempt to monopolize trade in violation of Sections 1 and 2 of the Sherman Act. This Court commented upon the Section 2 charges as follows (p. 667):

> "Of course, monopoly power need not be shown in order to warrant a finding of an attempt to monopolize. However, 'where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. * * * (Citation omitted). But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.' *Swift & Co.* v. *United States,* 196 U.S. 375, 396, 25 S.Ct. 276, 279, 49 L.Ed. 518 (1905).
>
> "Thus, to make out a prima facie case plaintiff was required to produce proof that a defendant's acts were not 'predominantly motivated by legitimate business aims' [*Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 626-627, 73 S.Ct. 872, 890, 97 L.Ed. 1277 (1953)], but instead were done in order to gain monopoly power. The acts themselves may be such as to suggest an illegal purpose, or they may require the assistance of additional facts; in either event the intent must be reasonably apparent. Here it is not."

In the case at bar, therefore, there must be evidence to support the inferences that defendants had the specific, subjective intent to acquire the power to fix prices and exclude competitors, and that their acts were not "predominantly motivated by legitimate business aims."

The verdict does not represent the jury's view of the evidence relevant to this element of plaintiff's claim. The *per se* boycott instructions effectively withdrew and precluded the jury from considering any of the substantial evidence defendants offered concerning the background, purposes, and effect of the eligibility rule. In this, defendants were substantially prejudiced with respect to the Section 2 as well as the Section 1 charge.

III.

THE DAMAGES WERE GROSSLY EXCESSIVE.

Since the plaintiff based its alleged damages solely on the eligibility rule and since the Court directed the jury to find the rule was an illegal boycott *per se*, it is no wonder the jury awarded substantial damages in this case. It is appropriate to discuss the damages at this point, having in mind the fundamental proposition that in treble damage cases the gist of the action is legal injury proximately resulting from a violation of the Sherman Act, and not merely the violation itself. See, *e.g. Winckler & Smith Citrus Prod. Co.* v. *Sunkist Growers, Inc.*, 346 F.2d 1012 (9th Cir. 1965.)

Plaintiff sought recovery of $50,000 actual damages, based upon two theories of lost profits. It claimed damages of $17,611.31 based upon loss of profits from specific business, being the loss incident to the 1961 City Tournament and the losses of five leagues during the three bowling

seasons, 1961-62, 1962-63, and 1963-64. It claimed additional damages of $32,503.68 based upon the alleged general loss of profits from open play and day leagues during the same three bowling seasons. See p. 32 above. All of these damages were caused according to the plaintiff, by the eligibility rule.

The jury's award of $35,000 actual damages was not segregated in any way, either as to the plaintiff's two damage theories or as to the time when the damages were incurred by plaintiff. Necessarily, the award had to be predicated in part on each theory of lost profits and had to include damages incurred after the date the complaint was filed, December 6, 1961.

There are two fundamental reasons why the award is grossly excessive and cannot be sustained:

A. The Award Included Damages Based Upon Acts Which Occurred After The Date The Complaint Was Filed.

The decision of this Court in *Flintkote Company* v. *Lysfjord,* 246 F.2d 368 (9th Cir. 1957), is on all fours with the case at bar. That case was an action under the Federal Antitrust Laws for treble damages against a trade association of acoustical tile dealers, its dealer members, and the Flintkote Company, a supplier of acoustical tile products. Plaintiffs were partners in a tile dealer firm which was a competitor of the member-dealers. Plaintiffs alleged a continuing conspiracy by the defendants whereby Flintkote refused to sell its tile products to plaintiffs which caused injury to plaintiffs' business.

Plaintiffs' complaint was filed July 21, 1962. The trial commenced May 4, 1955. Just as was done in the case at bar, the district court, over objection, admitted evidence

and instructed the jury that it could award damages for injuries incurred up to the date the trial began.

This Court reversed on this point, stating in part (246 F.2d at pp. 394, 395-6):

> "Two well-settled propositions of law govern the determination of this issue. Succinctly stated, they are, that a plaintiff is entitled to recover all damages for injuries proximately caused by wrongful acts committed *prior* to the filing of the action; and conversely, a plaintiff is not entitled to recover damages for injuries resulting from wrongful acts committed *subsequent* to the filing of the action. The time of the wrongful act controls the measure of damages. Thus, it becomes necessary to ascertain whether plaintiffs' injuries were caused by a prior act or whether they are attributable to protracted conduct and repetitive acts which continued beyond the date this action was filed."
>
> * * *
>
> "This cause of action is founded on an act of a continuing nature. The express refusal to deal constituted no more than a refusal to deal at that time. Plaintiffs' injuries were not caused just by the announced refusal but rather resulted from the explicit refusal coupled with the implied persistence in the announced course of conduct. Indeed, appellees themselves recognized the continuing nature of the conspiracy for in their brief they assert that:
>
> > 'At the time of trial it is clear that appellees * * * were still under the competitive limitations resulting from the conspiracy.' * * *
>
> "'[A] conspiracy * * * is in effect renewed during each day of its continuance.' *United States* v. *Borden Co.*, 308 U.S. 188, 202, 60 S.Ct. 182, 190, 84 L.Ed. 181."

This Court recently had occasion to reaffirm these principles in *Independent Iron Works, Inc.* v. *United States Steel Corporation*, 322 F.2d 656, 673 (9th Cir. 1963),

where it stated the plaintiff cannot recover damages except "as were the consequences of the acts of a defendant or the defendants committed prior to the time the complaint was filed. . . ."

The claimed violation in the case at bar is a single continuous conspiracy by the defendants to restrain, and to attempt to monopolize, trade and commerce. This claim is identical in nature with that alleged in the *Flintkote* case. As is apparent from the opinion in *Flintkote,* the continuing conspiracy in the case at bar was in effect a violation of the antitrust laws each day it existed, based upon new acts and giving rise to a new cause of action each day it existed. Thus damages based upon events after the date of the complaint are the result of acts occurring and causes of action accruing after that date.

The largest part of the jury's award must have been based upon acts and claims which occurred after the complaint was filed. The only acts causing injury to plaintiff prior to that time were those incident to the 1961 City Tournament, the alleged loss of the Men's Invitational League in mid-1961, and the alleged general loss of revenue during the September-December portion of the 1961-2 bowling season. The other alleged losses necessarily are predicated upon acts which occurred after the complaint was filed.

Pacific Lanes is not entitled in this action to recover any damages which were caused by the alleged conspiracy after the filing date. In these circumstances, the entire award must fall and a new trial granted. As was noted in the *Flintkote* case, here there also is no "acceptable basis for segregating the damage award" and no supplemental complaint or new action was filed by plaintiff. See 246 F.2d at pp. 396-7.

B. The Damages Awarded Were Not Sufficiently Proved, But Instead Are Predicated Solely Upon Speculative Evidence.

This Court set forth the applicable measure of proof of damages in the *Flintkote case,* 246 F.2d at p. 392:

> "We take it that the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue. Once that has been accomplished, the jury will be permitted to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' *Bigelow* v. *RKO Radio Pictures, Inc., supra,* 327 U.S. at page 264, 66 S.Ct. at page 580. The cases have drawn a distinction between the quantum of proof necessary to show the *fact* as distinguished from the *amount* of damage; the burden as to the former is the more stringent one. In other words, the *fact* of injury must first be shown before the jury is allowed to estimate the *amount* of damage."

There this Court concluded that, notwithstanding the *fact* of damage was established, the evidence of the *amount* of damage was "a mere interested guess" on the plaintiffs' part, amounting to speculation, and that the award could not be sustained. In that case, the plaintiffs sought actual damages predicated in large measure on alleged loss of profits. The proof consisted of oral testimony of the two plaintiff-partners and their accountant, supplemented by written computations. Neither of the two partners had had any prior management experience as tile dealers. They had been salesmen for a tile dealer. Their accountant merely performed the mechanical functions of computing figures given to him by the plaintiffs. (See 246 F.2d at pp. 390-

391.) As the Court noted, "the computation of lost profits was based on the assumption that the plaintiffs would make as much working for themselves in their first year of operation as they and their employer . . . made together from their sales in their best year working for that going concern; that hereafter, profits would increase as much as 50% annually." (246 F.2d at p. 391.) There was no evidence that they "would probably have obtained more business if they could have purchased Flintkote tile on a direct basis. . . ." (246 F.2d at p. 391.)

This Court held that this evidence was insufficient, stating (pp. 393-4):

> "We have reviewed the cases most favorable to appellees, but we have been unable to discover any case so fraught with uncertainty as the one at bar, which upholds a jury verdict. This Court only recently cautioned against giving 'judicial blessing to a decision based upon speculation, surmise, and conjecture.' *Wolfe* v. *National Lead Co.*, 9 Cir., 225 F.2d 427, 434. There the District Court's dismissal of an action because of failure of proof of injury was affirmed.
>
> "We recognize the fact that as we examine this feature of the case, injured plaintiffs and a wrongdoing defendant face the court. In such a context the record will not ordinarily be searched with a microscopic eye. Yet something better is required to sustain a jury verdict than a mere interested guess."

Other pertinent decisions of this Court which found evidence of damages in treble damage actions to be speculative and legally insufficient are *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prod. Co.*, 284 F.2d 1, 32-34 (9th Cir. 1960), reversed on other grounds, 370 U.S. 19 (1962), and *Wolfe* v. *National Lead Co.*, 225 F.2d 427, 430-432 (9th Cir. 1955).

In the case at bar, both the *fact* of damage and the *amount* of damages are predicated in substantial part solely upon speculation.

1. **Alleged loss of profits from open bowling and day leagues:** As it is involved in the case at bar, the eligibility rule admittedly had application only to league bowling. Where a bowler did his open bowling was immaterial. Open bowling at Pacific Lanes did not make anyone ineligible under the rule.

Thus, to recover for alleged loss of open bowling on account of the eligibility rule, plaintiff was required to prove some factual basis for its conclusion other than the existence of the rule itself. There is none.

Hoffman testified to his opinion that a decrease in league bowling causes a decrease in open bowling. (Tr. 1149.) There are two reasons why this opinion does not support the award. In the first place, accepting it as true, plaintiff did not attempt to prove and there is no evidence of an overall decrease in volume of league bowling at Pacific Lanes during any of the three seasons, but at most only the loss of the five specified leagues. In fact, the only evidence on this point is that Pacific Lanes could well have a larger number of leagues now than when it left the association. (Pp. 27, 35, 44 above.)

In the second place, not a single fact was offered to support Hoffman's opinion. To the contrary, the only factual evidence in the record is precisely to the contrary. Pacific Lanes itself kept records of its open bowling revenue, and this revenue *increased* rather than decreased during the three seasons for which damages are claimed. This is clear notwithstanding Hoffman himself, who was certainly cognizant of other aspects of his business, attempted to evade admitting this on cross-examination. (Pp. 35, 44 above.)

Moreover, defendants' expert witnesses surveyed the bowling business in Tacoma and concluded that open bowling at an establishment increased as league bowling decreased. (Pp. 43-44 above.) We perceive this is an obvious truism. The greater the league business in a house, the fewer the lanes available for open bowling; the lesser the league bowling, the greater the lanes available for open bowling.

Plaintiff also included the loss of day or housewives leagues as a part of its computation of a general loss of profits from decreased open bowling. Significantly, although plaintiff endeavored to prove the loss of five particular leagues, not a single instance of a loss of a housewives league was shown in the evidence. At most there is some evidence that it has been "difficult" to organize these leagues. (P. 40 above.) Whether or not this has been "difficult," the evidence overwhelmingly shows Pacific Lanes has been very successful in organizing them. (P. 27 above.) Moreover, there is no evidence that the eligibility rule ever prevented the organization of any such league at Pacific Lanes. To the contrary, the only evidence bearing on the point at all is that the housewives in day leagues generally were not interested in tournament bowling.

Defendants submit that there is no evidence to support Hoffman's opinion that the eligibility rule caused a decrease in open bowling or in day league bowling at Pacific Lanes.

But even if the *fact* of such damage were established, still plaintiff was required to prove the factual basis for the *amount* of damages so occasioned.

Here, the amount of damages is based solely upon the testimony of Hoffman and the accountant Fisher. The latter's testimony may be disposed of briefly. Just as

was the case in *Flintkote*, the accountant did no more than the mathematical computation of alleged net losses based upon the information given him by Hoffman. (Pp. 42-43 above.)

Hoffman's testimony is that Pacific Lanes lost two lines of open and day league bowling per lane per day during each of the three seasons. (P. 40 above.) We have related how he arrived at this and the factors he admittedly did not take into account. (Pp. 40-42 above.) It is apparent from his testimony that the two lines figure was no more than his arbitrary guess which he tried to dress up by describing as a "conservative estimate." It is significant, we submit, that at no time was any comparison made between open bowling at Pacific Lanes and open bowling at the two most comparable houses in Tacoma, Bowlero and New Frontier. If the eligibility rule did cause a drop in plaintiff's open bowling, presumably those houses would have enjoyed better open bowling than Pacific Lanes since both were members and the rule could not have adversely affected their businesses. It is equally significant that no consideration was given to the fact that the bowling business in Tacoma was on a general decline in each of the three seasons. Notwithstanding this, plaintiff still claimed the identical amount of loss of open and day league bowling in each of these seasons. (P. 32 above.)

This Court reversed an award predicated upon "a mere interested guess" in the *Flintkote* case. This result is equally appropriate here with respect to the unknown but necessarily substantial part of the award based upon the alleged general loss of profits from open and day league bowling.

2. **Alleged Loss of Profits From League Bowling:** The circumstances with respect to the five leagues are not significantly different. There are several reasons why the *fact* of damage was not established.

First, assuming *arguendo* that each of the five leagues in fact moved from Pacific Lanes, and that plaintiff is entitled to damages for the season in or just before which the leagues moved, there is nevertheless no evidence that any of the three leagues for which more than one season is claimed (Men's Invitational, Women's Invitational, and Plywood) stayed away from Pacific Lanes in the subsequent season or seasons because of the eligibility rule. In view of all the evidence concerning league practices in Tacoma (p. 34 above), it is apparent that each bowling season is a new leaf, so to speak. Once signed up, a league is contractually obligated to remain in the bowling establishment until the end of that season. But at that time, leagues are free to and in fact in substantial numbers do move to different establishments for the next season. Moreover, substantial numbers of the bowlers in a given league drop out from season to season. It is sheer speculation to assume that in a later season a league is comprised of the same bowlers as it was previously and that each of them is motivated in determining where the league should bowl by the same factors which entered into a previous decision.

There is no evidence that either the Men's Invitational League or the Women's Invitational League even existed, anywhere, after the 1961-62 season, yet damages are claimed for each for the two subsequent seasons.

Moreover, even if these two leagues did exist subsequently, there is no evidence in this case why any one of the three leagues did not return to Pacific Lanes at the close of the first season after they moved. Absent proof that

Pacific Lanes invited these leagues back and was refused because of the eligibility rule, there is no evidence to support loss of profits from these leagues beyond the first season.

The circumstances concerning these three leagues are remarkably similar to those referred to in the *Flintkote* case concerning Flintkote's refusal to sell to plaintiffs. (246 F.2d at p. 395.) Just as with Flintkote, the refusals of these leagues to bowl at Pacific Lanes were not irrevocable. The members of each of these leagues were free to change their minds and to conclude that they would rather bowl at Pacific Lanes than be eligible to bowl in BPA tournaments. Many of plaintiff's own witnesses testified that this is precisely what they did. (Pp. 26-27 above.)

Accordingly, the inclusion of loss of profits from these three league after the first season for which they moved was speculation at best.

Second, the evidence affords no basis for any damages on account of the Tacoma Commercial League. Plaintiff's own witness testified the league moved from Pacific Lanes to Villa Lanes at the end of the 1959-60 season. (P. 38 above.) Pacific Lanes was a POBPA member at the time the league moved. There is no evidence how the eligibility rule could cause this league to move from one member house to another member house. Necessarily, it moved for reasons other than the rule. Plaintiff's claim for damages based upon the refusal of this league to bowl during the 1962-3 season is completely unsupported by the evidence and is contradicted by plaintiff's own witness.

Third, the evidence concerning the Olympic League is just as defective. The jury could have concluded that Ehly stopped bowling at Pacific Lanes because he wanted

to bowl in BPA tournaments and could not do so and bowl in the league at Pacific Lanes. (P. 39 above.) However, the reason the league disbanded was not shown to be the eligibility rule. If this had been the case, the league would not have disbanded but would have moved to a member house. Rather, the evidence is the league disbanded only because Ehly dropped out.

Fourth, plaintiff could not in fact have suffered loss of profits as a result of the moving of any of these leagues unless it proved it had sufficient available lanes to handle these leagues in the season or seasons claimed. Hoffman testified that there were "spots available" for these leagues. (P. 31 above.) However, Pacific Lanes' own records showed that there were not enough lanes available in the 1963-4 season to handle both the Men's and Women's Invitational Leagues had they been in existence and wanted to bowl there. (P. 37 above.) This was also true as to the Tacoma Commercial League in the only season claimed for it, 1962-3, and as to the Olympic League for the only season claimed for it, 1963-4. (P. 39 above.) This evidence but further illustrates the absence of evidence of the fact of damage with respect to these leagues.

There was also no evidence to support the calculation of the amount of lost profits based on the Olympic League. There was no proof of the number of teams and bowlers in this league. (P. 40 above.) Without these facts, there was nothing on which to base the conclusion that Pacific Lanes suffered lost profits of $2,164.80, as claimed.

IV.

THE EVIDENCE IS NOT LEGALLY SUFFICIENT TO SUPPORT THE VERDICT THAT THE ELIGIBILITY RULE HAD THE REQUISITE EFFECT UPON INTERSTATE COMMERCE.

Defendants moved at the close of the plaintiff's case for a directed verdict on the grounds, *inter alia,* that there was not sufficient evidence showing that interstate commerce was affected by the alleged restraints. (Tr. 1228-36.) This motion was denied. (Tr. 1236-7.) The motion was renewed at the close of the evidence and again denied. (Tr. 2540.) In this the court erred.

This Court has stated that whether or not a particular restraint occurs in or has the requisite substantial effect on interstate commerce, is generally a question of fact for the jury. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prod. Co.*, 284 F.2d 1, 24 (9th Cir., 1960), reversed on other grounds, 370 U.S. 19 (1962).

It does not follow that it was proper in the case at bar for the trial court to submit the commerce issue to the jury in the face of the defendants' motion. In *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F.2d 656, 661 (1963), this Court stated the applicable principle. It referred to

> ". . . the rule approved by the Supreme Court, that 'it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding.' *Baltimore & O. R. R.* v. *Groeger*, 266 U.S. 521, 524, 45 S.Ct. 169, 171, 69 L.Ed. 419 (1925). Accord, *Gunning* v. *Cooley*, 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed.

720 (1930); *Southern Pac. Co.* v. *Pool,* 160 U.S. 438, 16 S.Ct. 338, 40 L.Ed. 485 (1896)."

The evidence and all inferences the jury could justifiably draw therefrom are insufficient to support the verdict that the eligibility rule had the requisite effect on interstate commerce.

A. There Were No Significant Aspects Of Plaintiff's Business Which Can Be Said To Involve Interstate Commerce. Even If There Were, There Was No Substantial Effect On The Interstate Aspects Of Plaintiff's Business.

In *Lieberthal* v. *North Country Lanes, Inc.,* 221 F.Supp. 385 (S.D. N.Y. 1963), plaintiff sought treble damages under the Sherman Act. Plaintiff had leased his premises in Plattsburgh, New York, to defendant North Country so the latter could operate a 32-lane bowling establishment. He alleged the other defendants, which operated bowling establishments in Plattsburgh, conspired with North Country to cause the cancellation of the lease. With respect to interstate commerce, the amended complaint alleged that the Plattsburgh area drew trade from Canada and Vermont; that establishments in Plattsburgh competed with alleys in Canada and Vermont; that patronage of bowling leagues in Vermont and Canada was actively solicited; that solicitation of trade was done by radio and television advertisements; that bowling equipment to be installed in the leased premises as well as other merchandise and supplies to be sold on the premises came from out of state; and that the defendants operated interstate businesses.

The District Court granted defendants' motion to dismiss for failure to state a claim. The basis for its decision was that a bowling establishment is a local business and

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A. There Were No Significant Aspects Of Plaintiff's Business Which Can Be Said To Involve Interstate Commerce. Even If There Were, There Was No Substantial Effect On The Interstate Aspects Of Plaintiff's Business.

In *Lieberthal* v. *North Country Lanes, Inc.,* 221 F.Supp. 685 (S.D. N.Y. 1963), plaintiff sought treble damages under the Sherman Act. Plaintiff had leased his premises in Plattsburgh, New York, to defendant North Country so the latter could operate a 32-lane bowling establishment. He alleged the other defendants, which operated bowling establishments in Plattsburgh, conspired with North Country to cause the cancellation of the lease. With respect to interstate commerce, the amended complaint alleged that the Plattsburgh area drew trade from Canada and Vermont; that establishments in Plattsburgh competed with alleys in Canada and Vermont; that patronage of bowling leagues in Vermont and Canada was actively solicited; that solicitation of trade was done by radio and television advertisements; that bowling equipment to be installed in the leased premises as well as other merchandise and supplies to be sold on the premises came from out of state; and that the defendants operated interstate businesses.

The District Court granted defendants' motion to dismiss for failure to state a claim. The basis for its decision was that a bowling establishment is a local business and

that the alleged restraints therefore did not have the requisite substantial effect upon interstate commerce. The Court of Appeals affirmed on the same ground. 332 F.2d 269 (2d Cir. 1964). Because the opinions in both the District Court and the Court of Appeals so clearly spell out the local character of a bowling establishment and the reasons why the restraints allegedly applied to such an establishment do not sufficiently affect interstate commerce, substantial portions thereof are set out in Appendix C. See page 117 *infra*. As the Court noted, one essential element of a treble damage action under the Sherman Act is that the conduct complained of affects the interstate commerce of the plaintiff's business or that the conduct otherwise has a substantial effect on interstate commerce. The *Lieberthal* case is persuasive authority here. The facts alleged and found insufficient in *Lieberthal* are of considerably more substance than the facts which can be relied upon with respect to interstate commerce in the case at bar. This is particularly true with respect to the alleged interstate aspects of Pacific Lanes' business.

None of the parties in the case at bar are engaged in interstate commerce. Hoffman himself testified that 99.9% of Pacific Lanes' business came from Pierce County, and that no one from out of state bowls in its leagues. Its competitors are only the nearby houses in Tacoma.

These are only two adjuncts of plaintiff's business which can possibly be said to involve interstate commerce to any degree. One is its mailing of rental payments to AMF in New York. According to plaintiff, these payments have been down by $3,000 in each of the three seasons, a total of $9,000 in all. We submit that this circumstance is so inconsequential and insignificant that a verdict based upon it is frivolous. Whether or not the amount of rental payments mailed in interstate commerce

is greater or lesser at one period of time than during some other period of time does not involve an effect on commerce. No decision to our knowledge has concluded that the requisite substantial effect on interstate commerce is satisfied by mere changes in the amounts of checks mailed to an out of state trade creditor by a business the activities of which are local in nature.

In *Foster & Kleiser Co.* v. *Special Site Sign Co.,* 85 F.2d 742 (9th Cir. 1936), this Court had before it precisely the same situation. There plaintiff charged a conspiracy whereby defendants prevented plaintiff from securing billboard sites which plaintiff needed in order to sell advertising. The Court found this type of business to be local in nature, much as bowling is a local business venture in the case at bar. Significantly, this Court held (at p. 750):

> ". . . Under such circumstances, in order to come within the provisions of the anti-trust laws, the effect upon interstate commerce must be direct and not remote and must be the result of an intent to restrain interstate commerce. *Coronada Coal Co.* v. *United Mine Workers,* 268 U.S. 295, 45 S.Ct. 551, 69 L.Ed. 963; *Packer Corp.* v. *St. of Utah, supra.* The mere inability of the appellant's competitors to use posters because they could not secure sites for billboards is so indirect an effect upon the commerce in bill-posting material as to be beyond the regulatory power of Congress. It is not covered by the Sherman Anti-Trust Act. . . ."

So it is with the rental payments here. The effect of the eligibility rule upon them is at most but indirect and remote. *United States* v. *Oregon Medical Society,* 343 U.S. 326, 338-9 (1952).

The same conclusion is appropriate with regard to the only other conceivably interstate aspect of plaintiff's business—its purchases of bowling supplies and merchan-

dise from AMF which it in turn resells to bowlers. Significantly, plaintiff did not attempt to prove any decrease in this part of its business, or claim any loss of profits on this account. The only evidence bearing on this is Manous' testimony that Pacific Lanes is a top customer and no one does more business, together with his testimony that AMF's sales of supplies and merchandise increased in 1963 over 1962. No effect on this part of plaintiff's business was shown.

We submit, therefore, that the interstate aspects of the plantiff's business in Tacoma were so incidental to the local character of its bowling establishment as to be inconsequential. Plaintiff's business is intrastate in nature and these incidental activities do not change this characteristic. The evidence of alleged effect on these incidental activities is such that reasonable minded persons could not find for the plaintiff on this point.

B. The Eligibility Rule Did Not Affect Interstate Commerce.

The evidence shows the terms, interpretation and application of the BPAA eligibility rule from time to time, such as that the rule has been enforced by BPAA. (Tr. 156-7, 205-6, 216; pp. 19-20 above.) However, it is admitted that no eligibility rule, whether of the BPAA or of the WSBPA, was applied with respect to bowlers participating in leagues in Pacific Lanes until after the end of the season in which Pacific Lanes withdrew from the POBPA, that is, until after the end of the 1960-61 season in or about June 1961. (Tr. 1127, 1132, 1621, 1622, 1874; PX 98.) And except for the period of time from June 1960 to June 1961, the BPAA's eligibility rule applied and governed the eligibility of bowlers only in connection with the BPAA's national tournaments and qualifying

events. Only two of these were in part held in Washington (Tr. 2746) and there is no evidence that Pacific Lanes lost any bowling business because some of its bowlers wanted to bowl in either. Consequently, the only eligibility rule which could have applied to cause any of the alleged injury to plaintiff's business was the WSBPA rule.

The WSBPA rule was not shown to be other than a rule adopted by WSBPA for its own tournaments. The BPAA had nothing to do with its adoption, terms or enforcement. So far as BPAA is concerned, any affiliated association is free to have whatever eligibility rule it wants for its own tournaments. Consequently, the WSBPA rule cannot be said to affect interstate commerce because of any interstate activities of BPAA. The state rule is wholly separate and independent from the national.

There is evidence from which the jury could conclude that because of the WSBPA rule and its tournaments, some bowlers preferred to do their league bowling in WSBPA member establishments so as to be eligible. However, whether or not bowlers in Tacoma or other cities in Washington thought enough of WSBPA tournaments that they made themselves eligible for them in no way affected interstate commerce. At most, this affected only where local residents decided to pursue a part of their recreational bowling.

The evidence shows that of the Canadian bowlers who came to bowl in tournaments in Washington (the annual number varied from Mr. Grant's 3,000 down to 150 or 200) some refrained from coming in 1963 and 1964 because of the eligibility rule, or so the jury could infer on the basis of Mr. Grant's testimony. As we note below, Grant's testimony was incompetent and should not have been ad-

mitted. Nevertheless, even accepting Grant's testimony, this is not sufficient evidence of an effect on interstate commerce.

There is substantial authority to the effect that, notwithstanding an incidental effect of an alleged conspiracy may be to reduce the number of persons who come from other states and countries to do or refrain from doing the thing which is allegedly restrained, essentially local activities are not thereby converted into interstate commerce or as having an effect on commerce. See, for example, *Spears Free Clinic and Hospital* v. *Cleere,* 197 F.2d 125, 126 (10th Cir. 1952); *Riggall* v. *Washington County Medical Society,* 249 F.2d 266, 268 (8th Cir. 1957); *Elizabeth Hospital, Inc.* v. *Richardson,* 269 F.2d 167, 170 (8th Cir. 1959); *Lieberthal* v. *North Country Lanes,* 221 F. Supp. 685, 688 (S.D. N.Y. 1963), aff'd, 332 F.2d 269, 271-2 (2d Cir. 1964). In the *Lieberthal* case, the District Court referred (221 F. Supp. at p. 686) to the conclusion that "crossing by bowling customers of state or international borders did not change an intrastate activity into an interstate one." In *Hotel Phillips, Inc.* v. *Journeymen Barbers,* 195 F. Supp. 664, 669 (W.D. Mo. 1961) aff'd *per curiam* 301 F.2d 443 (8th Cir. 1962), the court stated:

> "Neither the facts in this case or any other authority known, supports the theory here advanced, namely, that local activities are illegal under the Sherman Act because they concern persons who have moved in interstate commerce or who have received personal service and thereafter may have moved in interstate commerce."

This Court said in *Page* v. *Work,* 290 F.2d 323, 332 (1961):

> "However, despite the increased thrust of federal commerce power as business operations become more interrelated and complex, the courts have consistently required that in order for federal antitrust jurisdic-

> tion to be sustained the effect on interstate commerce of an alleged antitrust violation in a local area must be direct and substantial, and not merely inconsequential, remote or fortuitous. . . ."

Only in its effect upon bowlers can the eligibility rule be said to have any direct effect. It has no application to anyone else. As the foregoing authorities indicate, the effect on bowlers is neither the kind nor the extent of "direct and substantial" effect upon commerce which is required for a Sherman Act violation. See also *Monument Bowl, Inc.* v. *Northern California Bowling Prop. Ass'n,* 197 F. Supp. 208, 211 (N.D. Cal. 1961), reversed on other grounds *sub. nom. Breier* v. *Northern California Bowling Prop. Ass'n,* 316 F.2d 787 (9th Cir. 1963), in which Judge Harris stated "[b]owling customers are the relevant market in the case at bar and their patronage is purely local in character."

C. The Court Erred In Admitting Grant's Testimony Regarding Canadian Bowlers.

Mr. Grant's testimony about the effect of the eligibility rule on Canadian bowlers was offered and received for the sole purpose of showing the eligibility rule had an effect on interstate commerce. (Tr. 1094, 1096, 1098.)

In particular, Grant testified that he is the Regional Manager for the Consolidated Bowling Corporation of Niagara Falls, New York, which operates 45 bowling houses, most in the United States. Three of these houses are located in British Columbia, which is Grant's region, and he manages them, and has done so for the past four years. (Tr. 1082-84.) Bowlers from Washington bowl in tournaments which he has run in his houses. (Tr. 1086.)

There are 7,242 registered league bowlers in his three houses who belong to the ABC and the WIBC (Tr. 1085, 1090.) Twenty percent of these travel across the border to Washington to bowl. "For the over-all picture, it would be roughly 3,000 bowlers." (Tr. 1086, 1107.) These bowlers come to attend mostly handicap tournaments. (Tr. 1087.) In 1962, 986 B.C. bowlers participated in the All-Coast Tournament in Vancouver, Washington. (Tr. 1087.) Over the past 5 years, he has seen thousands of Canadian bowlers bowling in tournaments in Washington. (Tr. 1108.)

Consolidated was affiliated with BPAA but withdrew in 1963. (Tr. 1091.) Since it withdrew, the majority of Grant's bowlers are not eligible to bowl in tournaments in the United States, although some are. (Tr. 1092.) Since the withdrawal in 1963, his three houses have dropped about 10% in their league bowlers. (Tr. 1092-5.) Over objections (Tr. 1092-1097) the Court permitted Grant to testify in substance that this was caused by the eligibility rule. (Tr. 1095-7.) Grant testified the traffic of his bowlers to the United States has been affected "by this," meaning apparently either the eligibility rule or the withdrawal of Consolidated from BPAA in 1963, or both. (Tr. 1097.) The traffic is "down considerable. I couldn't break it down because of the total picture because some of them do bowl in BPAA houses." (Tr. 1097.) Bowlers from his three houses have been rejected from tournaments in the United States. (Tr. 1097-8.)

On cross-examination, Grant testified the source of his information about bowlers coming to Washington was his own files and records, which are an "accumulation" of the records of a city bowlers association, presumably in Vancouver, British Columbia (Tr. 1090, 1099, 1101), as well as information obtained from league secretaries and pro-

prietors, in Washington. (Tr. 1099, 1107.) The city association records consisted of a list of Canadian bowlers by name who have bowled in tournaments in Washington. (Tr. 1100-1101.) These records are compiled by the association secretary and maintained by the city association, not by Grant, except for the time he was city secretary in 1954. (Tr. 1102, 1103.) He is not an officer of the association. (Tr. 1103, 1183-4.) The records contain duplications and no attempt has been made to eliminate the duplications. (Tr. 1103-4.)

Grant did not testify to any connection between Canadian bowlers and plaintiff's business. The traffic which he testified to, of Canadian bowlers to Washington to participate in tournaments, did not refer to BPAA tournaments or any tournment by any party in the case. The gist of his testimony is his approximation that about 3,000 Canadian bowlers do come into Washington to bowl in tournaments each year, and this is down "considerably" since 1963.

Defendants objected to various parts of Grant's testimony. They objected to his testimony about the 3,000 bowlers per year as speculation (Tr. 1089), and about what happened to the league bowling business in his three houses after Consolidated withdrew, on the ground such was a conclusion of the witness without a proper foundation, also hearsay, immaterial, and beyond the issues in the case. (Tr. 1092-1096.) These objections were overruled. (Tr. 1089, 1094, 1097.) Defendants also moved to strike Grant's testimony as being beyond the issues, and this was denied. (Tr. 1098.) After Grant's cross-examination, defendants renewed their objection to his testimony on the grounds of hearsay, irrelevant and immaterial. (Tr. 1109-10.) The Court reserved its ruling. (Tr. 1110, 2069.)

It appeared subsequently that Grant's name was not on the list of plaintiff's witnesses and that he was a substitute for a Mr. Saunders who was unable to testify because of ill-health. (Tr. 1241-2.) The Court commented that Grant kept the records himself and was very well informed, and said "it wasn't hearsay, as I understand hearsay. . . ." (Tr. 1242.)

The Court was in error. Grant's testimony about the 3,000 bowlers coming to bowl in tournaments in Washington was based upon information contained in records of the Vancouver, B. C. Bowlers Association and upon information Grant obtained from third parties. Neither the records nor the third parties were produced. The records admittedly contained duplications. Contrary to the Court's understanding, Grant started keeping those records in 1954 but since at least 1960 he had had no connection with the records or with the association. His testimony was obviously hearsay, in fact, double hearsay since it was clearly offered for the truth of what he said and since the records themselves would have been hearsay had plaintiff attempted to offer them through Grant.

The error was prejudicial. The jury was invited to consider Grant's testimony in plaintiff's closing argument, where his testimony is emphasized. Indeed, it was inaccurately emphasized, since contrary even to Grant's testimony, plaintiff's counsel argued that all of the 3,000 Canadian bowlers have stopped coming to Washington. (Tr. 2620.) In addition, the jury was invited to consider this testimony by the Court's instructions. (Tr. 2776.) Apart from Grant's testimony, there is no evidence that the WSBPA rule had any effect on interstate commerce. This Court referred to similar circumstances in finding the admission of certain exhibits prejudicial error in *Standard Oil of California* v. *Moore*, 251 F.2d 188, 216-17 (9th Cir. 1957).

V.

THERE IS NO LEGALLY SUFFICIENT EVIDENCE THAT THE OTHER ASPECTS OF THE ALLEGED CONSPIRACY AFFECTED COMMERCE.

Only the eligibility rule is relied on by plaintiff as a basis for its claim of damages. We have shown that the rule itself did not have the requisite substantial effect on commerce. However, because of plaintiff's claim that the eligibility rule was a part of a single, overall conspiracy to restrain trade, the Court permitted voluminous evidence relating to alleged price fixing and "overbuilding committee" activities of the defendants. Since plaintiff admittedly was not caused any injury because of either the alleged price-fixing or the alleged overbuilding activities, it is necessary to review this evidence only with regard to whether it supports the verdict that interstate commerce was sufficiently affected. We submit that neither the alleged price-fixing nor overbuilding aspects of the alleged conspiracy provide this essential element of plaintiff's case.

A. The Evidence Regarding Alleged Price-Fixing Does Not In Any Way Support the Verdict.

The Court had some misgivings about submitting the price-fixing claim to the jury, and said at one point that were price fixing the only issue, it would not go to the jury. (Tr. 1801-3, 1806-9.) Defendants submitted that instructions concerning price-fixing would not be applicable to the evidence. Nevertheless, the Court gave the instructions and submitted this issue to the jury. Notwithstanding, the evidence does not support the verdict that there was price fixing as alleged or that, if there was, it had the requisite effect upon interstate commerce.

1. The evidence concerning prices.

The evidence is that BPAA and WSBPA had nothing to do with the prices of bowling in Tacoma, or anywhere else. (Tr. 2361-2, 2408, 2432-3.) Prices on a national basis were never discussed at any meetings of BPAA. (Tr. 1544, 2361.) Some of plaintiff's exhibits were apparently offered to show a connection between BPAA and the price of bowling. These exhibits indicate that BPAA took nationwide surveys to report the various prices of bowling throughout the country (PX 261-G; Tr. 2333) and that BPAA published articles on the subject which in general terms emphasized the importance of profits and criticized gimmicks, price cutting, and giveaway promotions. (PX 261-G.)

The actual prices for bowling in Tacoma varied from time to time and from establishment to establishment. (Tr. 326-7, 1007, 1713, 1843-4, 1933, 2177.) Mr. Stevenson testified there was a substantial range of prices throughout the Tacoma area in the years 1960-64. (Tr. 1009.) Price fluctuations occurred in both open and league bowling (Tr. 1009), as well as a number of price differentials for bowling clubs, groups, Sunday bowling, and price "gimmicks." (Tr. 1007.) Hoffman also testified prices have fluctuated in the Tacoma area since 1960. (Tr. 1172.)

The price of bowling was discussed at POBPA meetings. (Tr. 235-8, 420-8, 960-4, 1006, 1117-20, 1702, 1716-8, 2204.) Two of plaintiff's witnesses on this point testified that there was no agreement on prices (Tr. 257, 435-6), and indeed that there was disagreement. (Tr. 232-7). Defendants corroborated this. (Tr. 1741, 2177-8, 2202-3.) Professor North testified that the economic factors which characterize the bowling proprietors' business in Tacoma indicated a very competitive situation and no price fixng. (Tr. 1932,

1935, 1938, 1967.) He added that the Tacoma area is one in which competition is substantial and which comes as close to a competitive industry as almost any found in the United States today. (Tr. 1935.) The evidence also shows without dispute that there was no agreement on prices and that prices varied in other areas in Washington. (Tr. 2344, 2360-2, 2369, 2432-3.)

We perceive the only evidence which could possibly support an inference of price fixing was the following:

The proprietor of Westport Lanes, Mrs. Rydman, testified for plaintiffs that when she was asked to join the Southwest Washington BPA, she was given a copy of SWBPA's Code of Ethics by Mr. Block, the secretary of the SWBPA. (Tr. 797, 1020.) The Code included a provision that the price for spare practice on Sunday morning must not be less than $1.00 per person. (Tr. 797, 801; PX 262.) However, the WSBPA's code does not contain such a provision (DX A-73), and the SWBPA's code is separate and apart from WSBPA. (Tr. 1022-3, 2326.) Tacoma is not in the area which the SWBPA serves. (PX 174.)

There was also some testimony by Stevenson of discussions at POBPA meetings about dividing the Tacoma houses into two categories, the newer or "A" and the older or "B" establishments, and that the older houses would charge less for bowling. Stevenson participated in this discussion. However, the smaller (and older) houses objected and did not want to be regarded as second-rate houses in such a way. It was left up to the individual proprietor. It is by no means clear that anything came of it. (Tr. 963-4, 1702, 1714-6, 1716-8.)

Hoffman's testimony indicates that if there was any price agreement, he was a party to it. Hoffman testified that sometime in March 1960, at an association meeting, he and the other proprietors discussed league schedules and prices for the 1960-61 season, and they "set up" schedules of 32, 34, and 36 weeks with prices of $1.35, $1.40, and $1.45 respectively. He testified "the only agreement was a gentlemen's agreement that we would all quote those prices." (Tr. 1117-8.) The other proprietors were not identified. Hoffman also testified that at or about this same time, in February 1960, the bidding for the GTBA city tournament was also discussed and "they were all supposed to bid in at the same price, namely $1.50 on the three man game basis." (Tr. 1120.) He did not identify who participated in the discussion or whether this occurred at a POBPA meeting.

2. The only evidence of price fixing was incompetent.

Neither Hoffman's nor Stevenson's testimony should have been accorded any weight since, by its terms, it indicated that if there was any agreement on prices, Hoffman and Stevenson themselves were parties to the agreement.

The doctrine of *in pari delicto* is applied in antitrust cases where the plaintiff is a party to the very acts which are the basis for his claim. *Pennsylvania Water & Power Co.* v. *Consolidated G.E.L. & P. Co.,* 209 F.2d 131, 133 (4th Cir. 1953), cert. den'd 347 U.S. 960; *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.,* 138 F.2d 967, 971 (7th Cir. 1943), cert. den'd 321 U.S. 792; *Ford* v. *Caspers,* 42 F. Supp. 994, 998 (N.D. Ill. 1941), aff'd 128 F.2d 884 (7th Cir. 1942); *H. & A. Selmer, Inc.* v. *Musical Instrument Exchange,* 154 F. Supp. 697 (S.D. N.Y. 1957); *Lehmann*

Trading Corp. v. *J. & H. Stolow, Inc.,* 184 F. Supp. 21, 23 (S.D. N.Y. 1960). Since this is precisely the situation which the Hoffman and Stevenson testimony reveals, this Court *sua sponte* should disregard this evidence. *Ford* v. *Caspers, supra,* 42 F. Supp. at p. 998; *Brantley* v. *Skeens,* 266 F.2d 447, 452-3 (D.C. Cir. 1959). Plaintiff should not be permitted an advantage based upon acts in which it participated and now contends were illegal.

The Code of Ethics of the Southwest Washington BPA, and its provision about the price for spare practice, was admitted subject to being connected up with the defendants. (Tr. 804-5.) That association was not a party defendant. It was neither alleged to be nor shown to be a co-conspirator. The only defendant who was a member of SWBPA was Mr. Kulm. (Tr. 1019.) No other defendant was connected with the SWBPA except to the extent that local association was affiliated with the WSBPA. However, the WSBPA Code of Ethics contains no such provision and the incontroverted evidence is that the SWBPA's code is separate and apart from WSBPA and is something which SWBPA did on its own. In no way was SWPBA shown to have had anything to do with anything done by the defendant associations.

This exhibit was not admissible against any of the defendants, including Kulm, because it was not connected and had nothing to do with the alleged conspiracy. The only association to which it pertained was the SWBPA. An agreement among the members of that local association respecting the price of bowling in their houses is not relevant to and does not tend to prove the conspiracy charged against the WSBPA and the POBPA and their members. There is no evidence that the defendant proprietor associations or their members even knew the price provision in the SWBPA code existed.

3. **In any event, the evidence is not legally sufficient to support a jury finding of price fixing as alleged.**

In *Standard Oil Company of California* v. *Moore,* 251 F.2d 188, 198 (9th Cir., 1958), this Court stated:

> "The evidence is legally sufficient to support a jury finding on any question of fact, if it is of such substance and character that reasonable men might reach that conclusion. In determining whether the evidence meets this test, all reasonable inferences therefrom, favorable to the verdict, are to be drawn. Likewise, all conflicts between evidence submitted by the prevailing party and the evidence submitted by the losing parties are to be resolved in favor of the verdict. Where testimony submitted by the losing party, although not directly contradicted, is inconsistent with the verdict, it is to be assumed that the jury disbelieved such testimony, as it had the right to do.
>
> "In determining the sufficiency of the evidence to support the verdict, there is authority for appellate court disregard of the evidence held to have been improperly admitted. See *Oras* v. *United States,* 9 Cir., 67 F.2d 463, 465."

Applying this standard to the evidence of alleged price fixing in the case at bar, it is manifest that reasonable men could not reach the conclusion represented by the verdict.

The alleged conspiracy was claimed to be a nationwide conspiracy, *inter alia,* to fix the price of bowling. (See, e.g., Tr. 232-3.) There was no evidence of any such price-fixing conspiracy. The evidence that BPAA took and distributed surveys showing the prices being charged for bowling and published articles in general terms critical of price cutters is not sufficient. In addition, there must be evidence of an agreement with respect to the use of such information, and a showing that because

of the agreement the recipients are not free to do as they please with the information. This is established by two of the leading trade association cases. *Cement Manufacturers Ass'n* v. *United States,* 268 U.S. 588, 599, 603-604 (1924); *Maple Flooring Ass'n* v. *United States,* 268 U.S. 563, 582-584 (1924). There is no evidence from which the jury could properly infer any nationwide conspiracy to fix the price of bowling.

Nor are the defendants here shown in any way to be responsible for or participants in the above activities of BPAA. Participation in a conspiracy may not be inferred from mere membership in the trade association without more. *Metropolitan Bag & Paper Dist. Ass'n* v. *F.T.C.,* 240 F.2d 341, 344 (2d Cir. 1957); *Dale Hilton, Inc.* v. *Triangle Pub., Inc.,* 1961 Trade Cases ¶ 70,006 (S.D. N.Y. 1961); *The Report of the Attorney General's Committee on the Antitrust Laws,* p. 42.

Nor was there any evidence of any such conspiracy among WSBPA members in the State of Washington. At most, there is the aforesaid testimony by Hoffman and Stevenson about a local agreement or agreements among POBPA members in Tacoma, and the aforesaid provision in the SWBPA code. Even if deemed competent, the only reasonable inference to be drawn from this evidence is that there were local agreements on prices, one among POBPA members respecting Tacoma prices and one among Southwest Washington BPA members respecting prices in that area in the state. No evidence even tends to connect or relate these agreements to one another. The other evidence is overwhelmingly to the effect that there was no agreement on prices. In order to deem this sufficient proof of the nationwide conspiracy alleged, or of even a statewide conspiracy among WSBPA members, inference must be piled upon inference without any evidentiary support.

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4. There was no evidence that the alleged price fixing affected any interstate commerce.

Since there was no legally sufficient evidence of price fixing, obviously the price fixing aspect of the alleged conspiracy cannot serve as the basis for an effect upon interstate commerce. Consequently, the alleged aspect of the conspiracy upon which plaintiff relies as having injured his business, *i.e.*, the eligibilty rule, cannot on this account, be a violation of the Sherman Act.

But even if there were sufficient evidence of price fixing, it could amount only to agreements respecting purely local prices. There is no evidence that any such agreement had or could have the requisite effect on interstate commerce.

This case does not involve an agreement to fix the retail price of products moving in interstate commerce. The price here is the price at which local residents will bowl at bowling establishments in their vicinity. None of the defendant proprietors is in interstate commerce and certainly the act of bowling in their establishments is wholly unconnected with interstate commerce. Since the agreements did not occur in interstate commerce or as to goods or products in commerce, before they could constitute a *per se* violation of the Sherman Act, the evidence must show they had a substantial effect on commerce. See *Las Vegas Merchant Plumbers Ass'n* v. *United States,* 210 F.2d 732, 748 (9th Cir. 1954), cert. den'd 348 U.S. 817 (1954). We perceive no basis for any conclusion that these agreements had or could have any impact on interstate commerce.

Admittedly, a local conspiracy may affect interstate commerce sufficiently to violate the antitrust laws. See, e.g., *United States* v. *Employing Plasterers' Ass'n,* 347 U.S. 186, 189 (1954); *Page* v. *Work,* 290 F.2d 323, 332 (9th Cir.

1961); *Las Vegas Merchant Plumbers Ass'n* v. *United States, supra,* 210 F.2d 732, 739. But there must be some evidentiary basis on which the jury could reasonably conclude that such an effect existed.

Certainly, if as the Court of Appeals recently stated in *Lieberthal* v. *North Country Lanes, Inc.,* 332 F.2d 269, 271 (2d Cir. 1964), affirming 221 F. Supp. 685 (S.D. N.Y. 1963), "the operation of bowling alleys, without more, is a wholly intrastate activity," then an agreement on the bowling prices to be charged within a given community cannot affect interstate commerce. As this Court stated in *Page* v. *Work,* 290 F.2d at p. 331, the Sherman Act does not extend to "purely local restraints applied at a local level to a product which never enters into the flow of interstate commerce."

To the same effect are *Hotel Phillips, Inc.* v. *Journeymen Barbers,* 195 F. Supp. 664, 669 (W.D. Mo. 1961), affirmed per curiam 301 F.2d 443 (8th Cir. 1962), and *United States* v. *Starlite Drive-In Inc.,* 204 F.2d 419 (7th Cir. 1953).

B. The Evidence Regarding Alleged Overbuilding Activities Does Not Support The Verdict.

The only other aspect of the alleged conspiracy is the overbuilding activities of the BPAA and the WSBPA. However, it is pertinent first to note two things about this evidence:

First, the Court instructed the jury (Tr. 2781-2):

> "There is no evidence that this plaintiff suffered any injury or financial damage resulting from actions by the overbuilding committee. Indeed, the plaintiff readily admits this. Therefore, no damages can be found by you from any actions of the overbuilding committee.

> "The reason that the evidence regarding the overbuilding committee was permitted to come before you—and it is the only reason—was to help you determine the presence or absence of a conspiracy or combination. For this purpose you may consider that evidence during your deliberations."

The Court had previously so ruled and cautioned the jury when overbuilding exhibits were discussed. (Tr. 171, 174-6.) When the above instruction was discussed later, plaintiff's attorney agreed with the substance of this, but sought a change to indicate plaintiff had not even contended it had been injured by the committee. He represented that plaintiff had not claimed that it had been injured because of the overbuilding committee, that "we haven't tried to make this an issue," and that it "would be absurd" to so contend. (Tr. 2043-8.) It is thus apparent, we submit, that the allegations and voluminous evidence about overbuilding activities were proffered by plaintiff with only one purpose in mind, that of condemning the defendants on the basis of something having nothing to do with the plaintiff's actual claim, i.e., the alleged impact of the eligibility rule on its business.

Second, the only connection between the eligibility rule and the overbuilding committees is plaintiff's allegation they were part of the same, single conspiracy. There is no evidence that supports this conclusion. The plaintiff claims damages based solely upon the eligibility rule. Admittedly the WSBPA eligibility rule is the result of concert of action among the defendants. Consequently, if the rule is an illegal restraint, we cannot deny concert of action by the defendants with respect to it. But on the question of interstate commerce, the failure of the plaintiff to prove the overbuilding activities and the eligibility rule were parts of the same conspiracy is significant. Without such evidence,

the overbuilding activities may not be relied upon to avoid the failure of the evidence to show the rule had the requisite effect on interstate commerce.

1. The evidence concerning overbuilding.

The BPAA had a committee called the Overbuilding Committee which was created after its June 1957 annual convention. (Tr. 158-160.) There is no evidence it continued in existence in or after early 1960. In 1957, there were signs of a bad situation regarding the widespread building of new establishments. BPAA members were concerned. (Tr. 161, 177.) The purpose of the committee was to provide or try to develop information on exactly what was going on in the industry in this regard. BPAA did not know just what the situation was and the committee's function was to find out. (Tr. 161, 177.) It was to do all it could do to solve the overbuilding problem "within the law of the land." (PX 271-A, pp. 28-29.)

The committee had meetings with the two manufacturers, Brunswick and AMF, respectively, and attempted to convey to them the information the committee had gathered as to what was happening in the industry and expressed its concern over the oversupply of bowling establishments. (Tr. 179-181.) It sent data about conditions in particular areas to each of the manufacturers. (Tr. 182, 194-95; PX 4, 25.) The committee's efforts with the manufacturers did not cause the latter to slow down new construction, notwithstanding the reports by the committee to the members. (E.g. PX 21.) At most, it got "lip service" in that both manufacturers said they would do what they could to help, while the tremendous rate of building continued unabated and even accelerated. (PX 261-A, pp. 28-29.) The manufacturers did not change their terms. (Tr. 182-4.)

In July 1958, the BPAA suggested that state BPA's appoint state overbuilding committees to help solve the problem. (Tr. 186; PX 6.) Some did and the state committees were asked to pass back information about situations in their areas to the national committee. (Tr. 188-89.)

Such a committee was appointed by the WSBPA in or about August 1958. (Tr. 1524-25; PX 7.) Mr. Fasso was its chairman. (Tr. 1599.) He testified that there was intense competition between Brunswick and AMF and the committee feared this would lead to the wholesale installation of lanes, demoralizing the industry. (Tr. 1650-51.) The manufacturers were overly optimistic in their profit figures. (Tr. 1525-26.) The state committee did not intend to stop the growth of bowling and was fully in accord with the right of any person to invest in any trade or business, but felt it was useful to call to the attention of the prospective proprietors some of the dangers in the industry which were not always apparent. (Tr. 1602-3; DX A-72.) The committee never tried to compel the manufacturers not to sell. (Tr. 1626.) It informed them only that the committee either did not recommend a particular proposed installation or that the committee would take no action one way or another. (Tr. 1528.) The committee would disapprove or not recommend a location if it felt it was harmful to the area. It tried to judge on the merits whether a proposed installation had a good chance of success. (Tr. 1524-25.) The committee had no power and all it could do was to bring up its viewpoint to the people involved and leave it to them to make their own decision. (Tr. 1526; PX 63; DX A-72.) The committee was disbanded long before the New Frontier Lanes was built in 1961. (Tr. 1645.)

In a report to the members of the WSBPA, approximately a year after its creation, the committee outlined its procedures. (DX A-72.) If an existing proprietor protested a proposed installation, the committee checked with the manufacturer involved to be sure the installation was actually proposed, and requested a meeting with the manufacturer together with the prospective proprietor and any other interested parties who wished to attend. A population survey was made for comparison with that compiled by the manufacturer and the committee attempted to evaluate the area from the standpoint of lineage, promotional efforts, economic character and potential, and the rate of growth in the area. It then made a recommendation in most cases. In those instances where in the committee's judgment the proposed installation was doomed to failure, the committee recommended that the project be abandoned. In other cases, it recommended that the size of the new house be reduced to a more realistic number of lanes. In other cases it recommended that the installation be deferred. In recounting the effect of its work, the committee stated ". . . we must admit that the committee has been able to exert little or no effect upon the manufacturers up to the present. . . . The results achieved by the committee have been very disappointing." Then the committee recommended that in those instances where a prospective proprietor goes ahead with an installation over the protests of the committee, his application for membership in the proprietors' associations be held in abeyance for a reasonable time to determine whether he will promote his own clientele instead of pirating leagues and preying upon the work and investments of those who pioneered the business before him. (DX A-72.)

The respective branch managers of AMF and Brunswick testified on the subject of overbuilding. Mr. Larson of Brunswick testified that in the 12-13 years he had been branch manager, he was never approached by a committee or representative of the WSBPA or any of its local affiliates with reference to not selling equipment of any kind to anyone wanting to enter the business or with a recommendation that Brunswick not sell to any such person. (Tr. 1678-79.) He attended one meeting with the state overbuilding committee but the purpose of this was to get general information from the committee in what Larson termed its advisory capacity. (Tr. 1677-78.)

Mr. Manous testified to a series of meetings he held with the state overbuilding committee. He said proprietors asked him if they could have the opportunity to talk with prospects. (Tr. 275.) It was left up to the prospective proprietor involved whether or not he wanted to meet with the committee. (Tr. 281-3.) At practically every one of the meetings the prospective proprietor was present. (Tr. 305.) These meetings were to supply him with the information and opinions of the committee about the economic feasibility of putting the particular house in question in its proposed location. No coercion was ever used and at no time did AMF ever refuse to deal with anyone on account of the meetings. (Tr. 278, 279, 283, 285, 297-9, 302-3, 306-7.)

Mr. Fasso corroborated that he never heard that Brunswick or AMF had ever refused to sell to any prospect except for credit reasons. (Tr. 1630.) There is an indication in plaintiff's exhibit 36 that the overbuilding committee thought it had been successful in discouraging new operators. But Fasso testified this was "wishful thinking" at the time. (Tr. 1638.)

There was discussion about overbuilding at meetings of the POBPA but according to plaintiff's own evidence, there was no agreement reached between the proprietors concerning this. (Tr. 257.) There is some evidence that the POBPA also had an overbuilding committee in late 1959 (Tr. 241-2, 250-1), but the witness had this confused with the state overbuilding committee. (Tr. 251.) If there was a POBPA overbuilding committee, there is no evidence that it never met with anyone or did anything.

2. There was no connection between the eligibility rule and the overbuilding activities.

In the first place, the eligibility rule does not restrain trade. As we have already developed, the rule applies solely to bowlers in the pursuit of recreational activities.

Second, the overbuilding activities were an effort to assemble all the facts and to ask the manufacturers and prospective proprietors to consider all the facts before endangering their respective investments by continuing the tremendous rate of expansion. That the proprietors' fears were justified is apparent from the dismal conditions in the bowling industry today, with the manufacturers as well as proprietors. And that the Washington committee asked the manufacturers and the prospects not to make certain installations because of the committee's views on economic conditions does not amount to an unreasonable restraint. The evidence is clear each manufacturer acted unilaterally and according to its own interests and judgment. See, *e.g.*, *United States* v. *General Motors Corp.*, 216 F. Supp. 362, 364-5 (S.D. Calif. 1963) (criminal case); *Ibid*, 234 F. Supp. 85, 88-89 (S.D. Calif. 1964) (civil case) (probable jurisdiction noted, 380 U.S. 940, March 15, 1965); *Ibid*, 1964 Trade Cases, ¶ 71,250 (S.D. Calif. 1964) (findings in civil case).

Third, even if the WSBPA overbuilding activities be regarded *arguendo* as an illegal attempt to restrain the construction of new establishments, they did not affect the plaintiff or anyone else wanting to go into the business. In every case, the manufacturer and the prospect involved went ahead notwithstanding what the committee said. Even were there evidence to the contrary, we perceive the circumstances would be identical with the conspiracy to cancel the lease which was found in the *Lieberthal* case to be insufficient as an effect on commerce.

What is more pertinent here, however, is that there is no evidence from which the jury could infer the necessary connection between the rule and overbuilding. Rather, the evidence is only that the eligibility rule and the overbuilding activities were historically unrelated, and arose in circumstances different in time as well as nature. There is nothing factually in common between the origin and implementation of the rule and the origin and nature of the overbuilding activities.

The purposes which plaintiff attributes to the two are also entirely different. According to plaintiff, the rule is a device to cause bowlers to boycott non-member proprietors and the overbuilding activities were intended to keep prospective proprietors out of the industry. Obviously, keeping prospective proprietors out of the business would in no way serve to implement the alleged purpose of the rule to boycott certain existing proprietors. We do not

understand plaintiff to contend otherwise and, in any event, there is no evidence which could support the contrary contention.

If the contention is that the existence of the rule was a means of keeping a prospect out of the business, this is equally without evidentiary support. The only evidence which can possibly bear on such a contention is that the overbuilding committee wrote some of those who decided to go ahead and build new establishments, and advised them the committee was recommending that in the event they applied for association membership, their applications be held for a reasonable time to ascertain that they were not pirating leagues from existing houses. (PX 44, 45; DX A-72.) However, these letters on their face were not efforts to stop building, but a recognition that the prospect involved was going ahead with his plans. The prospect had already decided to build and there is no evidence that any prospect decided to forego his building plans because he desired membership and the letter indicated this might be delayed. Moreover, these letters were disregarded by everyone, witness plaintiff's prompt admission into POBPA notwithstanding it received such a letter. The connection with the eligibility rule is obscure to say the least. To be sure, a non-member would not be entitled to the benefits of association membership and prospective proprietors could believe that participation in the sponsorship of BPA tournaments would be of benefit to them. It does not follow, however, that the rule thus served as a means of keeping prospects out of the bowling business, any more than would the unavailability of any other benefit of membership such as WSBPA's insurance program. There is no evidence that the benefits of mem-

bership in a proprietors' association are the *sine qua non* of that business. Almost a third of the commercial establishments in the country are not BPAA members.

The committee also wrote PX 35, a letter suggesting that a form letter be sent to all WSBPA members requesting their help for the committee. The proposed form letter was to have an attachment which the proprietors were to be asked to show to prospects, to "debunk" the supposedly huge profits to be earned in the business and to let the prospect know that if he were not accepted into membership he would lose certain services and privileges. The eligibility rule was one of those mentioned in the proposed attachment. There is no evidence that anything came of this suggestion. So far as the record shows the form letter was never sent out.

We submit that no connection was shown between the eligibility rule and overbuilding. They were not shown to be dual aspects of the same conspiracy. However interstate in nature the overbuilding activities may have been does not serve as the basis for inferring that the rule had the requisite effect on interstate commerce.

Conclusion.

For the reasons stated, the judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,

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Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules, having in mind that application has been made for leave to exceed the page limitation.

KENNETH J. BURNS, JR.

September 13, 1965

APPENDIX A

Section 1 of the Sherman Act (15 USCA § 1) in pertinent part reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 2 of the Sherman Act (15 USCA § 2) reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

APPENDIX B

Plaintiff's Exhibits

[Note: Nos. 1-227 were marked at Tr. 73.]

No.	*Identified*	*Offered*	*Admitted*	*Refused*
1	157	159	176	
2	160	160	176	
3	159	160	176	
4	182	182	183	
5	185	186	186	
6	187	187	187, 190	
7	691	593, 693	597, 693	
8	Withdrawn		—	
9			861	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
10	691	597, 693	598, 693	
11	691	597, 693	693	
12	Withdrawn		—	
13	1606		186, 859	
14	188	189	189	
15	189	189	190	
16	691	597, 693	693	
17	Withdrawn		—	
18	Withdrawn	(191)		—
19	203	204	204	
20	190	191	192	
21	193		860	
22	192	192	193	
23	Withdrawn		—	
24	193	193	193	
25	193, 1606	194	194	
26	822, 1607	597, 822	822	
27	196	196	196	
28			859	
29	756	598	756	
30	756	598	756	
31	1650	598	2539	
32		2518	859, 2518	
33			859	
34	756	598	756	
35	822	598, 822	822	
36			859	
37			859	
38	691	599, 693	693	
39		2519		2539
40		2519		2539
41	1866	1867	1867	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
42				
43	206	206	206	
44	577, 952	577	578	
45	1645		859	
46		855	860	
47	196	196, 841		
48		599	849, 852, 2539	
49			860	
50				
51		599	852	
52			860	
53			859	
54			859	
55	239	239	240	
56	199	199	196	
57		855	859	
58				
59	391	391, 855	391, 618	
60			860	
61	Withdrawn		—	
62			859	
63	756	604	604, 756	
64			860	
65		604		
66				
67			860	
68	206	207	207, 861	
69			860	
70		606		
71			860	
72			860	
73	Withdrawn		—	
74			860	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
75	965		860	
76			860	
77				
78				
79			860	
80	208	209	209	
81	211	211	212	
82	Withdrawn		—	
83			860	
84	Withdrawn		—	
85	Withdrawn		—	
86		607	607	
87			860	
88				
89	Withdrawn		—	
90		609	611, 2519	
91	213	213	213	
92	971		860	
93				
94	1872	610	611, 2519	
95		855	860	
96		855	860	
97	Withdrawn		—	
98	1622		860	
99	Withdrawn		—	
100	"	857	860	
101	Withdrawn		—	
102				
103	Withdrawn		—	
104	"		—	
105	559	561	562	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
106				
107	746	611	746	
108	Withdrawn		—	
109	214	214	214	
110	214	214	214	
111	Withdrawn		—	
112			860	
113	Withdrawn		—	
114			860	
115	Withdrawn		—	
116		857	860	
117	Withdrawn	857	—	
118			860	
119	216	216	217	
120		2519		2521
121				
122	Withdrawn		—	
123			860	
124	Withdrawn		—	
125	216	217	217	
126			860	
127	Withdrawn		—	
128	2126		860	
129	Withdrawn	(616)	—	
130		857	860	
131			860	
132		858	860	
133		857	860	
134		857	860	
135	218	218	218	
136		857	860	
137		858	860	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
138			860	
139			860	
140				
141			860	
142	Withdrawn		—	
143			860	
144			860	
145				
146				
147	Withdrawn		—	
148	222	222	222	
149				
150				
151	Withdrawn		—	
152			860	
153	2119		860	
154	Withdrawn		—	
155	”		—	
156			860	
157				
158				
159	Withdrawn			
160	Withdrawn			
161	”			
162			860	
163				
164				
165	156	156	156	
166			860	
167			860	
168		207	860	
169			860	
170	Withdrawn		—	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
171			860	
172			860	
173				
174			860	
175	Withdrawn		—	
176			860	
177	Withdrawn		—	
178	155	155	155	
179			860	
180	Withdrawn		—	
181			860	
182	154	154	154	
183			860	
184	Withdrawn		—	
185	”		—	
186		2518	860, 2518,2539	
187	Withdrawn		—	
188	395	395, 616	403, 860	
189		2518	860, 2518, 2539	
190	Withdrawn		—	
191	”		—	
192	2417	2417	2419	
193			860	
194			860	
195	Withdrawn		—	
196	”		—	
197			860	
198				
199	Withdrawn		—	
200	”		—	
201	453		376	
202	Withdrawn		—	
203	Withdrawn			

No.	*Identified*	*Offered*	*Admitted*	*Refused*
204				
205	152	152	153	
206	Withdrawn		—	
207	Withdrawn		860	
208				
209			860	
210	Withdrawn		—	
211	”		—	
212	151	151	152	
213				
214	404	404	404, 860	
215				
216	Withdrawn		—	
217				
218				
219	Withdrawn		—	
220				
221				
222				
223				
224			860	
225	1664		367	
226	Withdrawn			
227		621	151, 621	
228	223	223	223	
229	453	2522	2522	
230	”	622	655	
231	”	622	655	
232	185, 453	839		841
233	453, 988			
234	453, 988			
235	453			

No.	*Identified*	*Offered*	*Admitted*	*Refused*
236	”			
237	”			
238	453			
239	78	79	79	
240	87	87	87	
241	87	87	87	
242	453		861	
243	”		861	
244	”		861	
245	”		861	
246	”		861	
247	”		861	
248	”		860	
249	”		861	
250	340	340	341	
251	340	340	341	
252	340	340	341	
253	338	338	339	
254	338	338	339	
255	338	338	339	
256	338	338	339	
257	338	338	339	
258	1052			
259	1052, 1211	1212	1213	
260				
261A	389			
261B	”			
261C	”	622	623, 2519	
261D	”			
261E	”	2522	2523	
261F	”			
261G	”	390, 622	391	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
261H	”			
261I	”			
261J	”			
261K	”			
261L	389			
261M	”			
261N	”	2523	Reserved & Withdrawn	
261O	”			
261P	”			
261Q	”			
261R	”	2524	2525	
262	721	796-7	798	
263	920			
264	2240	2246	2246	
265	2480	2497	2497	

Defendants' Exhibits

[Note: Nos. A-1 through A-70 were identified by list of exhibits.]

A-1			
A-2			
A-3			
A-4			
A-5			
A-6			
A-7			
A-8	1267	1301	1322
A-9	1268	1326	1331
A-10	1268	”	”
A-11	1268	”	”
A-12	1268	”	”
A-13	1268	”	”
A-14	1268	”	”

No.	*Identified*	*Offered*	*Admitted*	*Refused*
A-15				
A-16				
A-17				
A-18				
A-19				
A-20	1591	1592	1593	
A-21	1270, 1358	1359	1359	
A-22	1271, 1357	1359	1359	
A-23	1271, 1360	1361	1362	
A-24	1272, 1346	1348	1348	
A-25	1272, 1346	”	”	
A-26	1272, 1346	”	”	
A-27	1272, 1346	”	”	
A-28	1272, 1348	1349	1350	
A-29	1273, ”	”	”	
A-30	1273, ”	”	”	
A-31	1273, ”	”	”	
A-32	1273, ”	”	”	
A-33	1273, ”	”	”	
A-34	1273, ”	”	”	
A-35	1273, 1348	1349	1350	
A-36	1274, 1348	”	”	
A-37	1274, 1350	1350	”	
A-38	1274, ”	”	”	
A-39	1275, ”	”	”	
A-40	” ”	”	”	
A-41	” ”	”	”	
A-42	” ”	”	”	
A-43	” ”	”	”	
A-44	” ”	”	”	
A-45	” ”	”	”	
A-46	1276, ”	”	”	
A-47	1276, ”	”	”	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
A-48	1276, 1344	1345	1346	
A-49	"	1333	1335	
A-50	"	"	"	
A-51	"	"	"	
A-52	"	"	"	
A-53	"	"	"	
A-54	"	"	"	
A-55	1277	1341	1343	
A-56	"	"	"	
A-57	"	"	"	
A-58	"	"	"	
A-59	"	"	"	
A-60	"	"	"	
A-61	"			
A-62	"			
A-63	1297, 1343	1344	1344	
A-64				
A-65				
A-66	1407	1407	1408	
A-67	1351	1353	1353	
A-68	1532	1533	1534	
A-69				
A-70				
A-71	1402	1403	1406	
A-72	1590, 1600	1601	1601	
A-73	1590, 2401	2401	2401	
A-74A	1888	1891	1891	
A-74B	1888	"	1891	
A-74C	1888	"	1891	
A-74D	1888	"	1891	
A-74E	1888	"	1891	
A-74F	1888 "	"	1891	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
A-74G	1888	"	1891	
A-74H	1888	"	1891	
A-75	1991	1992	1992	
A-76	2214	2214	2214	
A-77	2230	2230	2230, 2234	
A-78	2233	2233	2234	
A-79	2256	2257	2257	
A-80	2413	2413	2413	
A-81	2413	"	2413	
A-82	2413	"	2413	
A-83	2413	"	2413	
A-84	2413	"	2413	

APPENDIX C

In *Lieberthal* v. *North Country Lanes, Inc.*, 221 F.Supp. 685, 688 (E.D. N.Y. 1963), after referring to decisions involving exhibitions such as boxing matches and theatrical productions, the District Court stated as follows:

> "These situations are entirely unlike the operation of bowling alleys, where the business supplies only the premises and equipment and the customer entertains himself; he is not entertained by the exhibition of persons or apparatus gathered in interstate commerce. The flow to the bowling alley of equipment and appurtenances is not averred in the amended complaint to be continuous and it could not be; it is virtually a 'one-shot' affair, the equipment being durable and long lasting. There is no averment that radio, movie or television rights are sold in respect of the activities conducted at the Plattsburgh alleys and obviously they are not. That radio and television are used to solicit customers for the local activity seems irrelevant; the radio and television stations may be engaged in interstate commerce but not, merely by use of these media, is the advertiser.

"Plaintiff cites *United States* v. *Employing Plasterers' Ass'n of Chicago,* 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618 (1954) and *United States* v. *Women's Sportswear Mfgrs. Ass'n,* 336 U.S. 460, 69 S.Ct. 714, 93 L.Ed. 805 (1949). These cases are not in point because they relate to the interstate sale of goods. Where the process of production, transportation and sale of goods in interstate commerce is a continuous one, a local restraint either at the beginning of the process (as in *Mandeville Farms,* above) or at the end of the process (as in *Employing Plasterers,* above) may nevertheless directly affect interstate commerce.

"Certainly such is not the situation here. On the contrary the bowling alley business is more like the operation of barber shops (*Hotel Phillips, Inc.* v. *Journeymen Barbers, Hairdressers, Cosmetologists, and Proprietors Intern. Union of Amer.,* 195 F.Supp. 664, W.D. Mo. 1961, affirmed per curiam 301 F.2d 443, 8th Cir., 1962), or hospitals (*Elizabeth Hospital, Inc.* v. *Richardson,* 269 F.2d 167, 8th Cir., 1959), or publishing legal notices (*Page* v. *Work,* 290 F.2d 323, 9th Cir., 1961). In these cases, incidental flow of supplies in interstate commerce to the local enterprise, or travel in interstate commerce of customers of the local enterprise, or soliciting business in other states for the local enterprise, did not make the local enterprise a part of interstate commerce under the Sherman Anti-Trust Act. See also *Coulter Funeral Home, Inc.* v. *Cherokee Life Ins. Co.,* 32 F.R.D. 358 (E.D. Tenn. 1963) dealing with the question whether operation of funeral homes is interstate commerce under the Act."

In its opinion affirming the District Court in the *Lieberthal* case, the Court of Appeals stated as follows (332 F.2d 269, 271-272 (2d Cir. 1964)):

"The operation of bowling alleys, without more, must be held to be a wholly intrastate activity.

"A business of which the ultimate object is the operation of intrastate activities, such as local sporting or theatrical exhibits, may make such a substantial utilization of the channels of interstate trade and commerce that the business itself assumes an interstate character. *United States* v. *International Boxing Club,* 348 U.S. 236, 241, 75 S.Ct. 259, 99 L.Ed. 290 (1955) (25% of income derived from interstate operations); *United States* v. *Shubert,* 348 U.S. 222, 225, 75 S.Ct. 277, 99 L.Ed. 279 (1955) (continuous interstate transportation of personnel, property, communications, and payments); cf. *Aeolian* v. *Fischer,* 40 F.2d 189 (2d Cir. 1930) (organ installation an integral part of interstate contract of sale). It has frequently been held, however, that the incidental flow of supplies in interstate commerce, *Page* v. *Work,* 290 F.2d 323, 332 (9th Cir.), cert. denied, 368 U.S. 875, 82 S.Ct. 121, 7 L.Ed.2d 76 (1961) (publishing legal notices); *Elizabeth Hospital, Inc.* v. *Richardson,* 269 F. 2d 167, 170 (8th Cir.), cert. denied, 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed.2d 120 (1959) (hospitals); *Lawson* v. *Woodmere, Inc.,* 217 F.2d 148, 149 (4th Cir. 1954) (cemetery vaults), the interstate travel of customers of the local enterprises, *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 230-32, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947) (taxicab service to and from railroad stations); *Elizabeth Hospital, Inc.* v. *Richardson, supra* at 170-71 of 269 F.2d, the solicitation of business in other states for the local enterprise, *Page* v. *Work, supra* at 329 of 290 F.2d, the utilization of interstate communications media, *Martin* v. *National League Baseball Club,* 174 F.2d 917 (2d Cir. 1949) (interstate broadcast of baseball games), or a location in an area of interstate activity, *Hotel Phillips, Inc.* v. *Journeymen Barbers, etc., Union,* 195 F.Supp. 664, 666 (W.D. Mo. 1961), aff'd per curiam, 301 F.2d 443 (8th Cir. 1962) (barbershops in Greater Kansas City Metropolitan Area), do not in themselves suffice to transform an essentially intrastate activity into an interstate enterprise.

"'The controlling consideration * * * [is] a very practical one—the degree of interstate activity in the particular business under review.' *United States* v. *International Boxing Club, supra* at 243 of 348 U.S., at 262 of 75 S.Ct. Lieberthal's complaint alleges that the influx of equipment necessary to outfit the bowling alleys would be substantial. But the initial outfitting would have been a 'one-shot' affair, as the District Judge observed, and could not be held to convert the bowling lanes into an interstate enterprise. The allegations in the complaint do not indicate that the interstate movement of customers and supplies to North Country Lanes or the interstate advertising by North Country Lanes involved or would have involved a significant degree of interstate activity. Under the above cited authorities, such allegations are insufficient to state a claim for relief under the Sherman Act. See *Martin* v. *National League Baseball Club, supra* at 918 of 174 F.2d ('the bare allegation in a complaint that the defendants made contracts with broadcasting and television companies will not support the jurisdiction of the court').

"It may be that defendants, as owners of national bowling alley chains, are interstate businesses. But 'the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.' *Page* v. *Work, supra* at 330 of 290 F.2d. Accord, *United States* v. *Yellow Cab Co., supra* (carriage by defendant of passengers from one train station to another is in interstate commerce but other taxi transportation to and from stations is intrastate commerce). Lieberthal does not allege any restraint of the national activities in which defendants are engaged; he complains only of an agreement affecting their intrastate operations.

"We hold that the complaint does not establish a Sherman Anti-Trust Act violation based on acts occurring in interstate commerce.

"We next consider whether the complaint can be sustained as stating a claim for relief based on local acts having a substantial effect on interstate commerce.

"As Lieberthal points out, the Sherman Act condemns wholly local business restraints that affect interstate commerce as well as restraints in interstate commerce. See *United States* v. *Employing Plasterers' Ass'n,* 347 U.S. 186, 189, 74 S.Ct. 452, 98 L.Ed. 618 (1954); *United States* v. *New Wrinkle, Inc.,* 342 U.S. 371, 377, 72 S.Ct. 350, 96 L.Ed. 417 (1952); *United States* v. *Women's Sportswear Mfg. Ass'n,* 336 U.S. 460, 464, 69 S.Ct. 714, 93 L.Ed. 805 (1949). But the effect of the local restraints on interstate commerce must be 'direct and substantial, and not merely inconsequential, remote or fortuitous.' *Page* v. *Work, supra* at 332 of 290 F.2d. See also *United Leather Workers Int'l Union* v. *Herkert & Meisel Trunk Co.,* 265 U.S. 457, 471, 44 S.Ct. 623, 68 L.Ed. 1104 (1924); *Las Vegas Merchant Plumbers Ass'n* v. *United States,* 210 F.2d 732, 739-40 n. 3 (9th Cir. 1954)."

No. 20131

In the

United States Court of Appeals

for the Ninth Circuit

SHATTUCK DENN MINING CORPORATION,
Iron King Branch, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Reply Brief of Petitioner

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SUBJECT INDEX

TABLE OF AUTHORITIES

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Respondent.

Reply Brief of Petitioner

There does not appear to be any dispute concerning the law applicable in this case. Rather, the question centers around the facts and whether or not the Board's findings are supported by substantial evidence on the record considered as a whole. In this case the Board's Decision and Order is based on suspicion alone, rather than substantial evidence, and should be set aside.

ARGUMENT

The Discharge of Nick Olvera

There is absolutely no direct evidence in the record to support the Board's finding that Olvera was discrimin-

atorily discharged. However, the Board argues that the following sequence of events support its conclusion that the Company must have discharged Olvera because of his Union activities:

1. Olvera participated in the Union's organizational drive and had been named a temporary Union officer.
2. The Union processed several grievances shortly after certification and Olvera helped in presenting some of them.
3. A grievance was filed on behalf of Olvera regarding an incident which had occurred between him and his Boss underground.
4. Kentro was alleged to have said that the Union was filing too many small grievances, which didn't amount to much, and he didn't like it.

According to the Board, the above constitutes substantial evidence to support its finding that "the Company discharged Olvera to discourage the Union's continued filing of grievances and its aggressive pursuit of bargaining." (Resp.Br., p. 18)

However, let us look at those events more carefully in the light of the entire record:

1. If Olvera had been active in organizational activities, neither the Company nor his partner was aware of it. (T.157, 270) Olvera, himself, acknowledged this. (T.68) Moreover, the Company had maintained an entirely neutral attitude toward the organizational activities and, even if Olvera had been active in the election, there is no evidence that it was any concern to Management. Other Unions had represented the Company's employees for many years, so this is not a case of an unorganized employer resisting a Union's organizational efforts, such as several of the cases cited by Respondent. (Resp.Br., p. 20, footnote 8)

When Olvera began helping process grievances for the new Union, he was doing nothing more than what he had done for years previously for predecessor unions. (T.11, 65-67) His relations with Management had always been good and there was no evidence to show that his helping handle grievances had any connection whatsoever with his discharge.

2. It should be noted that the International Union of Mine, Mill and Smelter Workers was certified as collective bargaining representative, not Local Union No. 942, as alleged by respondent. (Resp.Br., p. 3) The parties stipulated to this fact. (T. 13, 65) It is not clear from the record when Local 942 entered the picture, or what its status was.

Respondent's Brief gives the impression that the parties were engaged in contract negotiations. "The Board concluded that Olvera was in fact discharged, not for the reasons given, but as a warning to the Union, its officers and adherents of the dangers involved in the vigorous processing of grievances and the aggressive pursuit of bargaining." (Resp.Br., p. 18) This is contrary to the facts. The Company and Union had *not* begun negotiating a contract. (T. 50)

It is true that the new Union filed several grievances; however, there is no evidence to show that the number of grievances filed (five) was unusually large by comparison with the predecessor unions, or by this Union elsewhere in the mining industry.

3. The filing of the grievance on behalf of Olvera the day following the incident of insubordination was done very inconspicuously at the end of another meeting. In retrospect, it appears that this grievance was probably filed on the theory that a good offense is the best defense. Olvera knew he was in trouble with Channon and it would just be a question of time before Management learned of the in-

cident, which occurred the day before. Olvera had apparently been giving Channon a bad time and his defiance of Channon's order to Leadman Portugal appears to have been the straw that broke the camel's back and Olvera knew it. His subsequent, immediate compliance with the Boss' order for him to go to the grizzly indicates Olvera knew he had gone too far.

4. Respondent was careful not to mention the complete absence of any history of anti-union sentiment on the part of the Company of Kentro during his long career in mining. There was no showing of animosity by the Company against this or any other Union, or against Olvera personally. (T. 246, 271) Nevertheless, the Board accepts a vague statement of one unreliable witness that Kentro had "expressed disapproval of the number and kind of grievances the Union had been filing", thus indicating that he had an anti-union motive. (Resp. Br., p. 20), (T. 136)

It is doubful that such a statement was ever made. It isn't as though Portugal's testimony is standing alone unimpeached in the record. The other Union witness in effect denied that the statement was made when they failed to make any mention of such account when asked specifically what Kentro had said at that meeting. (T. 37-47, 177-180) If Kentro had, in fact, made such a statement there is no doubt that all of the Union witnesses would have reiterated it. Yet the Board discredited all other witnesses on this point to find the principal fact upon which to base its case against the Company.

Even assuming such a statement was made, we fail to see how it shows that the Company "had apparently determined to take a firm stand against the Union." (Resp. Br., p. 16) The temporary Local Union President testified that the discussion at this meeting was carried on in a perfectly friendly

manner. (T. 206-207) Two separate grievances were discussed.

Examining the record carefully (T. 136-137), it is very difficult to understand what Portugal actually did say.

"Q. Referring you to General Counsel's Exhibit No. 5, is that the grievance that was also taken up during that session?

A. Is this from—Manuel Gonzales, that is the one I understood. I never did see that before.

Q. This has taking senior men off their regular motorman job and leaving junior motormen. Do you recall if this was discussed?

A. That was discussed, at first, yes.

Q. That was the first thing that was taken up during this meeting?

A. Yes.

Q. O.K. Now, with reference to the grievance that was filed regarding the abusive language of a supervisor, do you remember what the company said concerning this grievance? Who spoke for the company, to your best recollection?

A. For the company?

Q. Yes.

A. Mr. Kentro.

Q. *Do you remember what he said about this particular grievance?*

A. *He said we was turning in too many grievances, small grievances that didn't amount to much, or something like that, and he didn't like it.*

Q. *What did he say about this particular one?*

A. *Well, Manuel, he asked for Sundays—*

Q. (Interposing) *No, I'm sorry. Referring to the grievance with respect to the abusive language of a supervisor,* the one in which your name appears as complainant, and Nick Olvera also was a complainant, *do you remember what the company said about that particular grievance?*

A. *No, not too much.*" (Emphasis added) (T. 136-137)

Thus, from the evidence on which the Board hinges its case, Kentro's comment, if made at all, was said in a perfectly friendly meeting in reference to an unrelated minor work assignment grievance of another employee. By saying it was trivial, which it appears to have been, the Board concludes that Kentro had an anti-union motive because Olvera filed a grievance. There is no connection. It would appear that the Board has strained to find a hostile anti-union motive where it simply did not exist.

The incident of insubordination wasn't an imaginary one. The record shows that there was a serious dispute between Olvera and his boss regarding the time for carrying out a work assignment. All witnesses agree that tempers flared and Olvera acknowledged that Channon felt his order had been countermanded. (T. 74-75) The Union's version of the incident to the Trial Examiner was not the same as given to the Company during the grievance presentation. Olvera had not raised the "lunch time" argument during the initial grievance meeting with the Company. (T. 265-266) Later he undoubtedly wanted to give some plausible excuse for his not wanting to blast. The record shows it was still an hour and fifteen minutes to normal lunch time (T. 70) and the task would have taken only a half hour. (T. 151)

Clearly, however, there was a dispute concerning the Company's right through its supervisors to direct the working force. It had nothing to do with unionism or discrimination, nor was such ever contended. There was ample reason for Management to conclude that the authority of the new Supervisor was being challenged and it should be nipped in the bud. We disagree completely with the Board's judg-

ment that the discipline was senseless or that the Company should have reversed its decision in the face of a strike. (Resp. Br., p. 24) Surely the Company's resistance to pressure to preserve what it believed was right does not constitute evidence of an unlawful motive!

In summary, it appears that the Board has resolved any disputed facts in favor of the Union to show an unlawful motive ignoring the following evidence tending to show that there was no discrimination:

1. The Company and Kentro have a long, unblemished history of good relations with unions. (T. 66-67, 245-249)
2. The Company has remained neutral during Union organizational campaigns and was entirely neutral in this election. (T. 246-249)
3. The Company and the Union representatives had immediately agreed upon a procedure to process grievances even though contract negotiations had not begun. (T. 50, 250-251)
4. Five grievances were routinely handled in a friendly atmosphere and were resolved to the Union's satisfaction as evidenced by the letter of commendation to Kentro. (Resp. Ex. 5)
5. Relations between Kentro and Olvera had always been good. (T. 66-68, 271)
6. Manager Kentro was very disturbed about Olvera's countermanding Channon's order. (T. 199) He sincerely believed that Olvera was trying to undermine the authority of the new supervisor. (T. 258, 261-262)
7. No accusation of an anti-union motive was ever made until after the strike. Logically it would appear that such charges would have been immediately

leveled at the Company by the experienced International representatives when they met with Kentro during the processing of Olvera's grievance if they had sincerely thought Kentro had an anti-union motive. (No representative of the certified International Union testified at the unfair labor practice trial.)

It is understandable that the Board would want to look beyond the sworn statements of Manager Kentro that he had no anti-union motive in discharging Olvera. (T. 270-271) But, it is not logical that the Company's testimony concerning facts and surrounding circumstances be rejected completely. There should at least be substantial evidence in contradiction or to impeach his testimony. An unlawful motive should not be presumed. There is not substantial evidence to base the inferences drawn by the Board from the testimony of the Union witnesses or from the surrounding circumstances.

The Notice

The statement by Respondent (Resp. Br., p. 3) that the Company had orally agreed to meet with the Union to process grievances is more correctly stated that the Company representatives and the certified International Union representatives had *mutually agreed* to process grievances as they had been handled in the past, i.e., the procedure outlined in the Steelworkers contract. (Resp. Ex. 4) (T. 50) It was a two-way agreement by the parties.

Grievances were being processed smoothly and there was no anticipated strike action by the certified Union. Rumors of a strike had come from individual employees, not the Union. (T. 275-276)

The notice was aimed at those certain individuals, who were rumored to have wanted a walkout despite the agreement for handling grievances between the Company and the Union.

The purpose of the Act is not to guarantee individual employees the right to do as they please, but to guarantee them the right of collective bargaining for the purpose of preserving industrial peace. It was precisely for this stability that the bargaining representative and the Company entered into their agreement for an orderly procedure for handling grievances. A meeting was scheduled on the Olvera grievance for May 4; a strike prior to exhausting the grievance procedure would have been unauthorized.

No employees were summarily discharged by virtue of the notice as suggested by Respondent. (Resp. Br., pp. 25-26) When the strike did occur, on May 5 *without notice from the Union,* the Company sent each employee a letter advising him of his right to return to work until a replacement was hired, and published an ad to this effect in the local newspaper. (Resp. Exs. 8 and 9) What more could have been done?

The Company had the right to replace the striking employees, who were attempting to achieve by use of economic pressure what had failed through the agreed grievance procedure, where, as the record shows, the discharge of Olvera was not unlawfully motivated.[1]

Jaime's Discharge

We agree that the "prosecuting witnesses", the Riveras, would have just as soon forgotten about the whole thing regarding Jaime's visit. Their testimony three months after

1. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, (U.S.Sup.Ct. 1937) 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed.1381.

the incident was not the same as their account to Kentro the day it occurred.

However, we submit that the intimidation by Jaime, which caused Mrs. Rivera to seek the assistance of the Company Manager, did in fact occur and such misconduct warranted his discharge.

CONCLUSION

In *Universal Camera Corp. v. N.L.R.B.*, the Court declared that the Board's findings must be set aside when the record "clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."[2]

We do not believe that there was a fair or reasonable evaluation of the testimony by the Board in this case. Its Decision and Order is not supported by substantial evidence on the record as a whole.

Therefore, we respectfully submit that the Board's Decision and Order be set aside in its entirety.

Respectfully submitted,

TWITTY, SIEVWRIGHT & MILLS

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Dated: November 16, 1965.

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2. *Universal Camera Corp. v. National Labor Relations Board*, (U.S.Sup.Ct.1951) 340 U.S.474, 490, 71 S.Ct.456, 466, 95 L.Ed.456.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RALPH B. SIEVWRIGHT

No. 20,131

In the United States Court of Appeals for the Ninth Circuit

SHATTUCK DENN MINING CORPORATION (IRON KING BRANCH), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition to Review and Set Aside, and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition to review and set aside an order of the National Labor Relations Board, issued against petitioner on March 31, 1965, and on the Board's cross-petition for enforcement, pursuant to Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). The

Board's Decision and Order (R. 37-38, 31-32)[1] is reported at 151 NLRB No. 129. This Court has jurisdiction of the proceeding; the unfair labor practices occurred in Humboldt, Arizona, where petitioner is engaged in the business of mining and milling lead and zinc ores (R. 13-14; 5-6, 11). No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. The Board's Findings of Fact and Conclusions of Law

The Board found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Nick Olvera and Lupe Jaime to discourage union activity. The Board further found that the Company violated Section 8(a)(1) by threatening employees with reprisal if they engaged in strike action. Finally, the Board found that the Company violated Section 8(a)(3) and (1) by denying reinstatement to 19 unfair labor practice strikers upon their unconditional offers to return to work. The facts on which these findings are based are set forth below.

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[1] The original papers in the case have been reproduced and transmitted to the Court pursuant to its Rule 10(2). "R." refers to the formal documents bound as "Volume I, Pleadings"; "Tr." refers to the stenographic transcript of testimony at the unfair labor practice hearing. References designated "GCX" and "RX" are to exhibits of the General Counsel and petitioner (respondent before the Board), respectively. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following, to the supporting evidence.

A. *Background: the Union is certified; employee Nick Olvera engages in union activities before and after the certification*

On April 2, 1964, Mine, Mill and Smelter Workers, Local Union No. 942 (referred to as the "Union" herein) was certified as the collective bargaining representative of the Company's employees following a Board-conducted election (R. 14; Tr. 13). For a period of more than 5 years preceding the Union's certification, a local of the United Steelworkers of America had served as the employees' collective bargaining representative (R. 14; Tr. 11, 65, 245). At the time of the events in issue here the collective bargaining agreement with the Steelworkers had been terminated and no new written agreement had been executed with the Union (R. 14; Tr. 250). The Company had orally agreed, however, that pending negotiation of a written agreement it would meet with the Union to process any grievances filed (R. 14; Tr. 50, 250-251).

Employee Nick Olvera was active in the campaign for the Union, soliciting signatures and introducing union organizers to the employees (Tr. 11-12, 87-88). A week after the Union was certified, it suppplied the Company with a list of temporary union officers, including Olvera, who was designated as vice-president, steward and member of the grievance committee (R. 14; Tr. 61, GCX8). During the next 2 weeks, the Union filed a variety of grievances with the Company involving such matters as mine safety and employee seniority (R. 17, 18, 24; Tr. 110-113, 252-255, GCX3, 4, 5). Olvera was active in the presentation and discussion of these grievances with company representatives (R. 14; Tr. 14, 31-34, 88-89, 172-174, 255).

B. *Supervisor Channon uses abusive language to Olvera on the job; Olvera files a grievance through the Union; and the Company discharges Olvera for alleged insubordination*

On April 21, 1964, employees Nick Olvera and Tony Portugal were working together on the swing shift under shift boss Derek Channon and night foreman Homer Edwards (R. 15; Tr. 14, 126). At their work station on the 2400 foot level they discovered a "missed" hole, *i.e.*, an unexploded powder charge that failed to go off because of defective wiring or a defective fuse (R. 15; Tr. 17-18, 100-101). After some preliminary cleaning of the site, Portugal and Olvera proceeded to the 2300 foot level to secure a new fuse for the charge (R. 15; Tr. 19, 100-101, 127). It was then approximately 6:20 p.m. (R. 15; Tr. 22, 72, 106, 150). Portugal and Olvera intended to return to the 2400 foot level with the fuse, finish cleaning up, set the fuse, bring their equipment up from that level, and set off the charge (R. 15; Tr. 22, 74, 102-103). The whole process would have taken approximately 30 or 35 minutes, which would have brought them to nearly 7:00 p.m.—an appropriate time for swing shift "lunch" (R. 15; Tr. 22, 103, 151, 155, 165-166, 170-171).[2] It was regarded as desirable to blast at this time because the dust and fumes from the explosion would have time to clear away during lunch and it would then be safe to return to work at that level, without any loss of time on the job (R. 15; Tr. 23, 102, 167-168).

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[2] Lunch on the swing shift is generally eaten sometime between 7:00 and 7:30 p.m. (R. 15, n. 3; Tr. 22, 70, 71, 151, 163, 167).

On their way to get the new fuse, Portugal and Olvera met shift boss Channon (R. 15; Tr. 20, 102). When Portugal explained that they had discovered a missed hole, Channon told him "to go ahead and blast it as soon as . . . [he] could" (R. 15; Tr. 127). Olvera, who was standing some feet away, called out "lunch time" (R. 15; Tr. 21, 72, 127-128, 133-134). Whereupon, Channon said to Portugal, "Wait a minute, Tony, Nick don't want to blast it" (R. 16; Tr. 23, 73, 128, 133-134, 152, 154). Turning to Olvera, Channon then indicated in obscene terms that he felt Olvera had been giving him a hard time, that he was in a position to return the favor with interest, and that he fully intended to do so at every future opportunity (R. 16; Tr. 21, 128, 154).[3] Portugal "took off" and went to get the fuse (R. 15; Tr. 128). Channon continued to talk to Olvera, ordering him first to go dig a ditch and then directing him instead to break up some large boulders that had collected on the "grizzly"—a kind of grate through which loose ore is sifted (R. 16; Tr. 21-22, 24, 105, 128, 154). Olvera, without argument, began work on the grizzly as directed (R. 16; Tr. 21, 23, 24, 105).

In the meantime, Portugal had met night foreman Edwards while getting the fuse and had told him of the missed hole without mentioning the exchange between Channon and Olvera (R. 16; Tr. 129). Edwards told Portugal that since it was already 6:20, he should go ahead and blast at lunch time (R. 16; Tr.

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[3] Channon had been a supervisor only 2½ months (R. 22, 23; Tr. 267-268).

129-130). When Portugal returned with the fuse, he found Olvera working on the grizzly (R. 16; Tr. 130). He asked Olvera to go back down to the 2300 foot level with him to set the blast (R. 16; Tr. 130). Olvera answered that he couldn't because he was under orders from Channon to continue the job he was on (R. 16; Tr. 130-131). Since Portugal could not do the blasting by himself, he joined Olvera at work on the grizzly (R. 16; Tr. 24, 131). When Channon reappeared nearly an hour later, Portugal asked if he would send Olvera to help with the blast (R. 16; Tr. 132-133). Channon agreed and directed Olvera to go with Portugal (R. 16; Tr. 132-133). It was then after 7:00 and by the time preparations were completed and the blast set off it was approximately 7:45 or 7:50 (R. 16; Tr. 25, 107).[4] Channon made no further mention of the incident that day or in the week following and none of the other supervisory personnel reprimanded Olvera on the subject (R. 16; Tr. 45, 113, 116).

On April 22, 1964, the day after the Channon-Olvera incident, a scheduled meeting took place between company representatives and the union grievance committee on a variety of mine-safety problems (R.

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[4] Portugal and Olvera ate lunch after the blast at a time later than normal (R. 16, n. 6; Tr. 107-108). It seems clear from the record that it was standard procedure for miners to clean and blast any missed hole they found without special orders from a foreman. Thus, had Portugal and Olvera not met Channon, they would presumably have gone ahead and set the blast off at approximately 7:00 p.m. as they had originally intended (R. 15, n. 4).

17; Tr. 27-28, 172-175, GCX 3, 4). The ranking company representative was General Manager Dan Kentro; the ranking union representative, temporary President Don Covey (R. 17; Tr. 32). Vice-President Nick Olvera was also present and took a very active part in the discussion (R. 17; Tr. 31-34, 173). At the close of the meeting President Covey presented to management a grievance filed by Olvera against Channon (R. 17; Tr. 35, 175, 257). The grievance was signed by all members of the grievance committee as well as by Olvera and Portugal (R. 17; GCX 2). It stated:

> The foreman using abusive language and threatening complainant, an officer and steward of local union, union requests that this foreman be reprimanded and this practice stopped immediately.

The next grievance meeting was held on April 28, 1964 (R. 18; Tr. 35, 37-38, 134, 176, 260). As the meeting opened, Manager Kentro remarked that the Union was "turning in too many grievances, small grievances that didn't amount to much . . . and he didn't like it" (R. 18; Tr. 136). Following a brief discussion of a grievance concerning seniority, the parties turned to consideration of Olvera's abusive language grievance (R. 18; Tr. 38-40, 135-137, 176-177, 261). Kentro led off with a statement about the functions and authority of shift bosses, after which he turned to Olvera and said, "Nick, this looks pretty serious" (Tr. 41, 117, 261). Olvera answered, "Yes, it does" (Tr. 117), and Kentro rejoined, "[N]ot for

us, for you" (Tr. 41, 117). Kentro then stated that although he did not condone the use of abusive language generally, he felt that in this particular instance Channon's language might have been justified because it appeared to him that Olvera had been insubordinate and had interfered with the carrying out of an order (R. 18; Tr. 261-262). He further stated that he regarded disobedience of an order as a serious breach of discipline and that there would be possible grounds for Olvera's discharge if he concluded that the incident had in fact taken place in the manner in which it had been reported to him (R. 18; Tr. 41, 179, 262).

Kentro then called upon Olvera and Portugal to give their versions of the incident and they recounted the facts set forth above (R. 18; Tr. 41-44, 118, 138-139, 156). Channon, who was present at the meeting, disputed this account in only one material respect; he asserted that in response to his direction to blast as soon as possible, Olvera had called out "No, no, lunch time," rather than simply "lunch time," as Portugal and Olvera contended (R. 18; Tr. 45, 121, 262-263). Portugal and Olvera insisted that Olvera had not said "no, no," [5] and undertook to point out that it was unreasonable for Channon to have construed Olvera's response as a defiance of his order when, almost simultaneously with this alleged insubordination, Olvera had promptly acceded to Chan-

[5] Channon did not testify at the unfair labor practice hearing; the testimony of Portugal and Olvera on this point stands uncontradicted in the record (R. 16, n. 7, 17; Tr. 21, 45, 133-134, 151-152).

non's order to work on the ditch or the grizzly (R. 18; Tr. 45, 46, 151-152, 179, 264). Channon did not contend that he had repeated the order to blast or made any attempt to find out what Olvera's response meant before berating him and directing that he undertake the other work (R. 18; Tr. 43, 121). The meeting closed with a statement by Kentro that he would sleep on the matter and, if he decided that Olvera's conduct had in fact been insubordinate, he would have his discharge slip made out in the morning (R. 18; Tr. 41, 138, 179, 266).

The next day, April 29, Olvera was handed a discharge slip, dated April 28, and signed by Kentro, which read as follows (R. 18; Tr. 47-48, GCX 6):

> Discharged for refusing to obey an order at or about 6 p.m. on April 21, 1964, by his supervisor Mr. Derek Channon and interfering with an order given to Mr. Tony Portugal by Mr. Portugal's supervisor, Mr. Derek Channon at the same time noted above.

C. *Olvera files a grievance on his discharge; the Company posts a notice threatening to discharge employees if they engage in strike action; and the employees strike to protest Olvera's discharge*

Following his discharge on Wednesday, April 29, 1964, Olvera went to the Union's office and consulted with other union officials (R. 19; Tr. 49-50, 181). Together they prepared a written grievance protesting Olvera's discharge and requesting his reinstatement with full back pay and all rights restored (R. 19; Tr. 49-50, 181-182, 272, GCX 7). A meeting was sched-

uled on this grievance for the following Monday, May 4 (R. 19; Tr. 51, 184-185, 273).

On Friday, May 1, the Company posted on its bulletin board a notice to all employees, signed by Manager Kentro, which read as follows (R. 19; Tr. 62, 275, GCX 9):[6]

> This notice to all employees at this operation is being made because of rumors which have come to our attention that there may be an *attempt by some employees to stop the operation of the Iron King Mine in the near future.* The Company wishes to state that *operation* and *production* will continue at the Iron King. In order to avoid any misunderstanding, the Company hereby *notifies you* that each employee is expected to report for work at his regulraly scheduled work shift time, unless he has an excused absence permit signed or approved by both his Department Head and the General Manager. Employees *failing to report for work will be considered as having quit* and will be dropped from the payroll, unless they have obtained the excused absence permit referred to above. [Emphasis as it appears in the original.]

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[6] At the unfair labor practice hearing, Kentro testified that this notice was posted because following the Union's certification as bargaining representative rumors had circulated that a strike might ensue (R. 19; Tr. 275-276). According to Kentro, the Company wanted to make it perfectly clear that it intended to continue operations in the event of a strike and wanted to remind employees of its long established policy concerning unexcused absences (R. 19; Tr. 276). The provisions of the notice, however, are actually more stringent in several particulars than the Company's "rules governing excused and unexcused absences" (R. 19, n. 9; RX 7).

On Sunday, May 3, approximately 80 employees attended a special union meeting to consider what action to take on Olvera's discharge (R. 19; Tr. 52, 141-142, 183). Following a lengthy discussion of the circumstances of the discharge, the employees voted unanimously to call a protest strike if the grievance was not satisfactorily adjusted the next day (R. 20; Tr. 52, 141-142, 183-184).

On Monday, May 4, the scheduled meeting between union and company representatives on the discharge grievance took place (R. 20; Tr. 52, 185). Olvera and Portugal repeated their statements on the April 21 incident in substantially the form recited above, *supra*, p. 5 (R. 20; Tr. 186-187). Manager Kentro would not permit union representatives to question shift boss Channon on his version of the episode (R. 20; Tr. 54, 186, 274). After listening to the evidence presented, Kentro said he "had not heard anything . . . that would tend to change [his] mind regarding this discharge" and that he was standing by his decision (R. 20; Tr. 187, 274). The chairman of the grievance committee replied that in that case, they would "have to settle this on the picket line," and the meeting concluded (R. 20; Tr. 274-275, 145, 187, 293).

The following morning, Tuesday, May 5, pickets appeared in front of the mine bearing signs that stated generally, "Local 942, on strike, Unfair" (R. 20; Tr. 54, 188). A majority of the approximately 200 employees then working refused to cross the picket line (R. 20; Tr. 206). Manager Kentro immediately made announcements on the radio and was quoted in

the newspapers as saying that the mine would continue to operate, that he considered those on strike as having quit, and that he was looking for replacements (R. 20; Tr. 280-281, 282-283, 296-299, RX 9, 11).

On Thursday, May 7, the Company sent letters to the strikers stating that since they had failed to report for a scheduled work shift it was enclosing their paychecks for the preceding week. The letters further stated that production at the mine was continuing and that the Company was undertaking to replace the strikers, but that those reporting before replacements had been secured would be reinstated without prejudice. Finally, the letters stated that the strikers had become ineligible to receive benefits under the Company's group hospitalization, disability, and medical care policy since they had removed themselves from actively employed status (R. 20; Tr. 280, RX 8).

On Friday, May 8, the Union filed an unfair labor practice charge against the Company alleging that Olvera's discharge had been motivated by antiunion considerations, in violation of Section 8(a)(3) and (1) of the Act (Tr. 81, GCX 1(a)).

D. *Employee Lupe Jaime warns a fellow employee about the possible consequences of not joining the strike and the Company discharges Jaime for alleged strike misconduct*

Employee Lupe Jaime joined the strike on Tuesday, May 5, 1964, and thereafter participated in picketing at the mine (R. 21; Tr. 217). Jaime was a long-time

friend of Ernie Rivera, a non-striker (R. 21; Tr. 224). On Saturday, May 9, Jaime drove to Rivera's home (R. 21; Tr. 222). Rivera came out of the house to meet Jaime and stood at the door of his car discussing the strike situation with him through the window on the driver's side (Tr. 222, 237-238). Rivera's wife remained inside the house, at the door, listening to their conversation (Tr. 315-316).

Jaime, referring to Rivera's refusal to join the strike, asked, "How come you didn't stick by us, Ernie?" (R. 21; Tr. 222, 315, 323). Rivera answered that he had a family to support and bills to pay (R. 21; Tr. 223). Jaime rejoined that "everybody has got bills to pay," but Rivera replied, "[W]ell, I just can't do it" (Tr. 223, 323). Jaime said, "[Y]ou've got a lot of friends that probably won't want to speak to you after this, nobody will want to drink with you, eat lunch with you, or anything like that" (Tr. 223, 315, 325). When Rivera answered that he didn't care, Jaime continued, "[Y]ou will probably go downtown and be drinking, run into some of the fellows drinking and they will probably threaten you, want to fight you, might call you names" (R. 21; Tr. 223, 315, 319-320, 323-324). But Rivera still said, "I don't care, let them" (R. 21; Tr. 223), Jaime replied, "O.K.," and asked Rivera what he was doing on the job (Tr. 223). Rivera answered that they were all working on the grizzly "pulling muck" and "scraping the rocks" (Tr. 223). Jaime then said goodbye and the two men parted amicably (R. 21; Tr. 223).

Shortly thereafter, Mrs. Rivera telephoned the Company to report that Rivera had the flu and would

not be in to work that day (R. 21; Tr. 316). In the course of the call, Mrs. Rivera reported Jaime's visit and his conversation with her husband (R. 21; Tr. 316). This report was later relayed to Manager Kentro who immediately drove to the Riveras' house and offered to assist them in instituting police action against Jaime (R. 21; Tr. 302, 316-317, 326). Rivera refused the offer, stating that Jaime was a good friend (R. 21; Tr. 302, 317, 326). The following Monday, May 11, 1964, Kentro wrote Jaime a letter discharging him for "unlawful conduct during a strike" (R. 21; Tr. 303, 218-219, GCX 10).

E. ***The Union calls an end to the strike and the Company denies reinstatement to 19 of the strikers on the ground that they have been replaced***

On Monday, May 11, 1964, company and union representatives met with a federal conciliator in an effort to settle the strike (R. 20; Tr. 54, 189, 289). The conciliator attempted to get the parties to submit the merits of Olvera's discharge to arbitration (R. 20; Tr. 54-55, 85, 189-190). The Union agreed to this proposal, but the Company rejected it, and the meeting closed without any resolution of the strike issue (R. 20; Tr. 54-55, 189-190, 289-290, 294).

Shortly thereafter, union officials met with the employees to decide whether to continue the strike (R. 20; Tr. 56, 191). After some discussion, they agreed that since the Company was hiring replacements it would be advisable to call off the strike and to handle Olvera's case by processing the charges already filed with the Board (R. 20; Tr. 56, 190-191). On Tues-

day morning, May 12, 1964, the strikers reported back to work (R. 20; Tr. 56, 190-191, 284). The Company reinstated the bulk of the strikers, but denied reinstatement to 19 on the ground that replacements had been hired to fill their jobs (R. 20; Tr. 284-288).

On these facts, the Board concluded that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Nick Olvera to discourage the Union's continued filing of grievances and its aggressive pursuit of bargaining (R. 26, 37). The Board further found that the Company violated Section 8(a)(1) by posting its notice of May 1, 1964, threatening employees with reprisal if they engaged in strike action (R. 26-27, 37). Finally, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Lupe Jaime for engaging in protected strike activity (R. 28-29, 37) and by denying reinstatement to 19 of the strikers who struck to protest Olvera's unlawful discharge (R. 27-28, 37).

II. The Board's Order

The Board's order directs the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act (R. 31). Affirmatively, the Board's order directs the Company to offer immediate and full reinstatement to Olvera and Jaime and to all strikers previously denied reinstatement on the ground that they had been

replaced; to make these employees whole for any loss of pay suffered by reason of the discrimination against them; and to post appropriate notices (R. 31-32).

SUMMARY OF ARGUMENT

Following certification on April 2, 1964, the Union entered on its duties as bargaining representative in a vigorous and aggressive manner. Rumors were circulated that strike action was imminent and within the first 3 weeks of its certification the Union had filed five grievances covering a number of specific complaints. Most of these complaints, which related to mine-safety conditions, were successfully resolved to the Union's satisfaction. But by the fourth week of the certification, the Company had apparently determined to take a firm stand against the Union. Thus, at the opening of the grievance meeting of April 28, Manager Kentro stated that the Union was "turning in too many grievances, small grievances that didn't amount to much . . . and he didn't like it." Kentro then not only defended shift boss Channon against the abusive language grievance filed by the Union's acting vice-president, Nick Olvera, but threatened that Olvera might be discharged for "insubordination."

The misconduct of Olvera that supposedly warranted his discharge and Channon's use of obscenity in reply, consisting of calling out "lunch time" when Channon told Olvera's partner to "go ahead and blast" an unexploded powder charge as soon as he

could. In fact, the necessary preparations would have taken until approximately lunch time in any event and blasting at this time was consistent with recognized safety and efficiency practices at the mine. Moreover, Channon himself had never suggested that Olvera's conduct might warrant discharge and Olvera had continued to work under his direction and to obey orders without further reprimand for a week following the incident. Nonetheless, Manager Kentro discharged Olvera on the day following the meeting on his abusive language grievance, allegedly for "refusing to obey" and "interfering with" a supervisor's order.

Two days later, in response to the strike rumors that had circulated since the Union's certification, the Company posted a notice warning that employees failing to report for work would be "*considered as having quit*" and would be "dropped from the payroll" unless they had excused absence permits approved by the Department Head and the General Manager.

At a meeting called the following Monday to consider a grievance filed by Olvera on his discharge, Manager Kentro refused to permit union representatives to question shift boss Channon and reaffirmed his decision to discharge Olvera. The next day, a majority of the employees went on strike to protest Olvera's discharge. In the course of the strike, the Company discharged employee Lupe Jaime for seeking to persuade a long-time friend to join the strike and telling him, among other things, that some of the strikers might ostracize or fight him if he did not join them. When the strike ended, the Company denied

reinstatement to 19 of the strikers on the ground that they had been replaced.

Substantial evidence on this record supports the Board's finding that the Company discharged Olvera to discourage the Union's continued filing of grievances and its aggressive pursuit of bargaining. Contrary to petitioner, the Board, through its Trial Examiner, did not attempt "to act as an arbitrator and substitute [its] judgment for management's as to proper discipline" (Br. 10-11). Rather, the Board considered the insubstantiality of the grounds for discharge offered by petitioner as a factor in determining the real motive for its action. On the basis of the entire record, including the evidence affirmatively linking Olvera's discharge with the grievance proceeding he had initiated, the Board concluded that Olvera was in fact discharged, not for the reasons given, but as a warning to the Union, its officers, and adherents of the dangers involved in the vigorous processing of grievances and the aggressive pursuit of bargaining.

In addition, the Board properly concluded that the Company's posted notice constituted a threat to discharge employees for engaging in strike action and thus tended to interfere with, restrain, and coerce them in the exercise of their statutory rights. Substantial evidence supports the Board's further finding that striking employee Lupe Jaime did not engage in threats or other misconduct that would remove his attempt to elicit strike support from the protections of the Act or justify the Company's discharge of him for

"strike misconduct." Finally, the Board properly held that the employees who struck to protest Olvera's discharge are unfair labor practice strikers, entitled to reinstatement with back pay from the date of their unconditional offers to return to work.

ARGUMENT

I. Substantial Evidence Supports the Board's Finding That the Company Violated Section 8(a)(3) and (1) of the Act by Discharging Employee Nick Olvera to Discourage the Union's Continued Filing of Grievances and Its Aggressive Pursuit of Bargaining

Olvera was employed by the Company for 9 years prior to his discharge, without ever receiving a serious reprimand on his work (R. 22; Tr. 10, 57-59). He participated in the Union's organizational drive and following its certification on April 2, 1964, was elected temporary vice-president and member of the grievance committee, *supra*, p. 3.[7] In the next few weeks Olvera acted as one of the Union's chief spokesmen at grievance meetings with the Company in presenting and securing successful resolution of a number of complaints relating to mine safety conditions (R. 14; Tr. 31-34, 38-39, 172-175, GCX 3, 4, RX 5). At the close of one such meeting on April 22, 1964, the Union presented to the Company a grievance filed by Olvera against shift boss Channon for using abusive language to him on the job (R. 17; Tr. 35, 175, 257, GCX 2). This grievance came up

[7] On April 9, 1964, the Union gave the Company notice of the election of its temporary officers and stewards, including Olvera (R. 14; Tr. 61, GCX 8).

for discussion at the next meeting of the parties on April 28, 1964 (R. 18; Tr. 37-40, 134-137, 176-177, 260-261). Manager Kentro opened this meeting by expressing disapproval of the number and kind of grievances the Union had been filing [8] and closed the meeting by warning that Olvera might be discharged for "insubordination" (R. 18; Tr. 41, 136, 138, 179, 266). Although Kentro indicated that he would "sleep on" the matter, the discharge slip handed Olvera the next morning was dated the same day as the grievance meeting (R. 18; Tr. 41, 47-48, 138, 179, 266, GCX 6).

The record thus provides affirmative support for the Board's finding that the Company discharged Olvera in immediate response to his filing of a grievance against a supervisor and in retaliation for his earlier prosecution of complaints as acting union vice-presi-

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[8] The challenge urged by the Company (Br. 18) to the Board's finding of fact that Kentro made this statement criticizing the Union for its filing of grievances is without merit. Manager Kentro did not deny the credited testimony of employee Tony Portugal that such a statement was made (R. 18, n. 8). Contrary to the Company's contention, Portugal's obviously inadvertent misstatement of the length of time shift boss Channon had been employed as a supervisor—a fact not in issue here—would not warrant overruling the Board's crediting of his undenied testimony on what occurred at the grievance meeting of April 28, which he attended and took part in. It is well settled that such findings of fact, and the credibility determinations on which they are based, are properly for the Board and its trial examiners. See, *Bon Hennings Logging Co.* v. *N.L.R.B.*, 308 F. 2d 548, 554 (C.A. 9); *N.L.R.B.* v. *Davisson*, 221 F. 2d 802, 803 (C.A. 9); *N.L.R.B.* v. *San Diego Gas & Electric Co.*, 205 F. 2d 471, 475 (C.A. 9).

dent and member of the grievance committee. Although the Company was free to resist the demands of the newly-certified Union on their merits, it could not, under Section 8(a)(3) and (1) of the Act, combat these demands indirectly by discharging "one of the more forcible union adherents . . . as a warning to the Union to take it easy, and at the same time challenge and weaken it" (R. 25).

The Company seeks to defend the discharge of Olvera by alleging that it grew out of his grievance against Channon only in the sense that investigation of the grievance brought to light facts warranting his discharge (Br. 17-18). Thus, the Company contends that the immediate cause of Olvera's discharge was his insubordination to shift boss Channon—or, at least, management's belief that he had been insubordinate to Channon. As the Board found, however, the record fails to support either Olvera's actual insubordination or the Company's good faith belief in his alleged insubordination (R. 22-24).

According to Manager Kentro, following the filing of Olvera's abusive language grievance on April 22, 1964, he called in Mine Superintendent Sundeen and asked him to investigate the matter and report back to him (R. 17; Tr. 257-259). Although Sundeen and Channon, himself, submitted written reports to Kentro that allegedly led Kentro to believe in Olvera's insubordination, the Company neither offered these reports in evidence at the unfair labor practice hearing nor called Sundeen or Channon to testify as witnesses (R. 16; n. 7, 17; Tr. 258, 267, 292, 305-306, Co. Br.

4).[9] Moreover, assuming *arguenda* that these reports led Manager Kentro to believe initially that Olvera was guilty of insubordination, the subsequent grievance meeting of April 28 made clear that the incident between Channon and Olvera represented at most a personal misunderstanding and that no defiance of orders was intended. Thus, it was demonstrated that Channon had directed Portugal to blast the missed hole as soon as he could and that Olvera had simply called out "lunch time," which was, in fact, entirely consistent with the instruction to blast as soon as possible, and which also accorded with sound mining practice.[10] It was further brought out

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[9] At the grievance meeting of May 4 on Olvera's discharge, Manager Kentro refused to permit union representatives to question Channon, *supra*, p. 11.

[10] Even assuming that Manager Kentro felt justified in crediting Channon's statement that Olvera had also said "no, no," and in discrediting the statements of Portugal and Olvera to the contrary, this interjection could not reasonably be interpreted as an expression of defiance and insubordination, under all the circumstances presented here, including Olvera's ready obedience to Channon's subsequent direct commands (R. 23-24). Moreover, Channon himself never suggested that Olvera had done anything warranting discharge; on the contrary, even at the height of his irritation, he assumed that Olvera would continue on the job and threatened to give him a hard time in the future (R. 22, 23; Tr. 21, 45, 292). The Company seeks to explain Channon's failure to report the incident or to recommend Olvera's discharge on the ground that Channon was inexperienced as a supervisor (Br. 18). On this record, as the Board noted, it seems more likely that Channon's inexperience and insecurity on the job led to his initial outburst, and that after calming down, he too concluded that Olvera had not intended any defiance of his or-

at the meeting that despite Channon's burst of obscenity in response, Olvera had been ready without argument to obey his first direction to go dig "some ditch" and his subsequent order to work on the grizzly (R. 16; Tr. 21, 23). Finally, it was made clear that Channon had not sought any explanation of Olvera's meaning nor repeated his direction to blast as soon as possible before berating Olvera and directing him to other work (R. 22, 23-24; Tr. 23-24, 307). Manager Kentro testified at the unfair labor practice hearing on his own awareness that no direct order to blast had been given Olvera (Tr. 309-310). Thus, he stated (Tr. 308):

> Mr. Channon was a green supervisor, a new supervisor; an older supervisor would have made a direct order at that point and would have made it clear that he wanted the hole fired to Mr. Olvera.

In marked contrast to his decision that Olvera's conduct in these circumstances warranted discharge, Manager Kentro testified to the attitude he had taken in an earlier case of alleged insubordination. In that instance, the employee had been discharged by his immediate supervisor; but Manager Kentro concluded, after investigation, that "there was a possibility" the employee "had not clearly understood" his supervisor, and he accordingly changed the discharge to a

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ders in suggesting that the blasting be done at lunch time (R. 22, 23). In this connection, it may be noted that night foreman Homer Edwards had independently directed Portugal to do the blasting at lunch (R. 16; Tr. 129-130).

10-day layoff (Tr. 290). Similar contrasts are presented in the record between the Company's generally lenient disciplinary policy and its asserted conviction that the behavior of Olvera in the instant case warranted no punishment less severe than discharge (R. 25; Tr. 59-60, 146-147, 191, 290-291).

Contrary to the Company (Br. 20), there is no impropriety in looking to the apparent senselessness of the harsh penalty attached to Olvera's conduct here in judging the good faith of the Company's representations as to its motive; for "[i]t is well settled that the inferences drawn by the Board are strengthened by the fact that the explanation of the discharge offered . . . fails to stand under scrutiny." *N.L.R.B.* v. *Dant & Russell*, 207 F. 2d 165, 167 (C.A. 9). See also, *N.L.R.B.* v. *Homedale Tractor & Equipment Co.*, 211 F. 2d 309, 314 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B.* v. *Sebastopol Apple Growers Union* 269 F. 2d 705, 710 (C.A. 9); *N.L.R.B.* v. *Griggs Equipment, Inc.*, 307 F. 2d 275, 278 (C.A. 5). Moreover, Kentro's decision to discharge Olvera despite his knowledge that there might be "some trouble" because these things are "not taken lightly by anybody," his adherence to the decision in the face of a strike, and his refusal to go to arbitration on the matter, all support the view that to the Company, Olvera's discharge represented round one in a fight to test "the determination of the newly chosen bargaining representative to stand up against management resistance" (R. 25).[11] And this view is further borne out by sub-

[11] See the undenied testimony of Union President Covey that when he presented the grievance protesting Olvera's

sequent company actions also found to constitute unfair labor practices.

II. The Board Properly Found That the Company Violated Section 8(a)(1) of the Act by Posting a Notice Threatening Employees With Discharge for Engaging in Strike Action

Two days after Olvera's discharge, the Company posted a notice stating, *inter alia*, that "rumors . . . have come to our attention that there may be an *attempt by some employees to stop the operation of the Iron King Mine in the near future*" and warning that "[e]mployees *failing to report for work will be considered as having quit* and will be dropped from the payroll, unless they have obtained [an] excused absence permit [approved by the Department Head and the General Manager]" (R. 19; GCX 9).

It is well settled that an employer violates the Act if he discharges employees for going on strike or

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discharge to Manager Kentro, Kentro stated, "[N]ow, the game is over, I think we understand each other" (Tr. 182). Contrary to the Company's contention (Br. 23-25), no adverse inference may be drawn from the Union's initial effort to secure reinstatement for Olvera through normal bargaining processes and its deferral of unfair labor practice charges until May 8, 9 days after the discharge (R. 25, GCX1(a)). Obviously, it is preferable, if possible, to secure an immediate and amicable settlement through private channels rather than to pursue the more involved and time-consuming course of a public remedy. In any event, judgment of the Company's motive must be based on the record developed at the unfair labor practice hearing; it does not depend on the immediate reaction of union officials. As the Trial Examiner noted, "The issue is not what the Union representatives said or did at the time, but what can reasonably be said to have in fact motivated Respondent's action" (R. 25).

threatens them with discharge by asserting that all who fail to report for work will be treated as having resigned. *N.L.R.B.* v. *West Coast Casket Co., Inc.*, 205 F. 2d 902 (C.A. 9); *N.L.R.B.* v. *McCatron*, 216 F. 2d 212, 215 (C.A. 9), cert. denied, 348 U.S. 943; *N.L.R.B.* v. *Globe Wireless Co.*, 193 F. 2d 748, 750 (C.A. 9), and cases there cited; *N.L.R.B.* v. *U.S. Cold Storage*, 203 F. 2d 924, 927 (C.A. 5), and cases there cited, cert. denied, 346 U.S. 818. That the Company made such a threat here is indisputable on this record. Both the language of the notice itself and the testimony of Manager Kentro belie the Company's contention that the notice was intended merely as a restatement of long-standing company policy on unexcused absences (Br. 27).[12] Thus, Kentro admitted that the notice was posted in response to strike rumors that had circulated since the Union's certification as bargaining representative and the terms of the notice demonstrate that it was designed to combat anticipated strike action (R. 19, 26-27; Tr. 275-276, GCX 9). Equaly without support is the Company's assertion that the notice was directed only at unprotected and perhaps unauthorized work stoppages by a "few employees" (Br. 27). Nothing in the notice or the surrounding circumstances at the mine would have

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[12] As noted, *supra*, p. 10, n. 8, the Company's general rules relating to unexcused absences were, in fact, less stringent than the terms of the posted notice. Moreover, the Company's rules could not, in any event, justify a threat to discharge employees for engaging in strike action. Cf. *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9, 16-17.

conveyed such a limitation on the Company's threat to the employees and the strike that was, in fact, called was fully authorized and protected.

The Company further contends that even if the notice might reasonably have been construed as a threat to discharge strikers when first posted, this threat was cured by the Company's subsequent announcement and letters stating that strikers would be reinstated on application if their jobs had not yet been filled by replacements (Br. 27). Clearly, however, these reassurances, which came after the strike's inception, could not retroactively dissipate the effect of the notice in dissuading employees from joining the strike in the first place.[13] Thus, the reasonable tendency of the Company's notice of May 1 was to undercut the strike at its inception on May 5 and

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[13] Moreover, the tone of the letter to the strikers was not as reassuring as the Company would suggest. Thus, each striker received a letter signed by General Manager Kentro, which began, "Dear Mr. ——: We note that you did not report for work on your scheduled work shift May 5, 1964, and for that reason, we are enclosing a paycheck for the period April 26, 1964 through May 4, 1964." Although the letter promised that if "you report for work before a replacement is hired, you will be reinstated without loss of seniority," it warned that "because you have failed to report for work a replacement will be hired for your job," and concluded, "By failing to report for work on May 5, 1964, you removed yourself from the actively employed status . . . and you have, therefore, become ineligible to receive benefits" under the Company's group hospitalization, disability, and medical care policy (R. 20; RX 8). A letter phrased in these terms, far from curing the Company's original threat to discharge strikers, might even reinforce it in the minds of men, unversed in the law, whose jobs were at stake.

to be instrumental in the Union's ultimate capitulation on May 12. And it is, of course, the reasonable tendency of such threats to inhibit protected concerted activity that is the test of their legality and not, as the Company suggests (Br. 27), their virtually unprovable actual effect. *N.L.R.B.* v. *Ford*, 170 F. 2d 735, 738 (C.A. 6), and cases there cited; *Joy Silk Mills* v. *N.L.R.B.*, 185 F. 2d 732, 743-744 (C.A.D.C.), cert. denied, 341 U.S. 914.

III. Substantial Evidence Supports the Board's Finding That the Company Violated Section 8(a)(3) and (1) of the Act by Discharging Employee Lupe Jaime for Alleged Strike Misconduct

On May 9, 1964, the Company admittedly discharged striking employee Lupe Jaime for his conduct in attempting to persuade a long-time friend and fellow employee, Ernie Rivera, to join the strike. The Company seeks to defend its action on the ground that Jaime threatened Rivera in order to attain his objective and thus removed his activity from the protection of the Act. This contention, however, is refuted by the record evidence. Thus, the Company's own witnesses, the Riveras, testified that Jaime's visit was an amicable one and that he spoke as a friend of long-standing in attempting to persuade Rivera to join in the strike (R. 28; Tr. 318-319, 320, 327-328). Although Jaime indicated his belief that some of the strikers would ostracize and might try to fight Rivera if he refused to join them, he made no suggestion that he himself would have anything to do with this conduct; nor did he make a

personal threat of any kind (R. 28; Tr. 223-225, 315-316, 323-324).[14] Neither of the Riveras regarded Jaime's statement as a threat of personal retaliation or instigation of others to retaliate (R. 28; Tr. 319-320, 327-328).

Under these circumstances, as the Board noted, Kentro's immediate visit to the Riveras on hearing of the incident; his offer to have Jaime arrested, which Rivera rejected; and his summary discharge of Jaime form a pattern reminiscent of that followed in Olvera's case and provide support for the conclusion that Kentro used the alleged threat as a pretext to retaliate against Jaime for protected strike activity, in violation of Section 8(a)(3) and (1) of the Act (R. 28). Moreover, assuming *arguendo* that Kentro had a good faith belief that Jaime had engaged in strike misconduct, this belief could not provide a defense for the discharge where, as here, the record establishes that the misconduct did not in fact occur and that the avowed belief was, in any event, mistaken. See *N.L.R.B.* v. *Burnup & Sims*, 379 U.S. 21, 23.

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[14] Clearly, action of this sort is well within the protection of the Act and an employee discharged for engaging in it is entitled to reinstatement with all rights restored. Cf., *N.L.R.B.* v. *Morrison Cafeteria Co.*, 311 F. 2d 534, 538 (C.A. 8); *N.L.R.B.* v. *Wichita Television Corp.*, 277 F. 2d 579, 584-585 (C.A. 10), cert. denied, 364 U.S. 871; *N.L.R.B.* v. *Coal Creek Co.*, 204 F. 2d 579, 581 (C.A. 10); *Republic Steel Corp.* v. *N.L.R.B.*, 107 F. 2d 472, 479-480 (C.A. 3).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue denying the petition to review and enforcing the Board's order in full.[15]

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October 1965.

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[15] No independent issue of significance is presented by that portion of the Board's decision and order finding that the denial of reinstatement to 19 of the strikers constituted a violation of Section 8(a)(3) and (1) of the Act, and directing a remedy therefor. It is well settled that if the discharge of Olvera was unlawfully motivated, the employees who struck to protest the Company's action were unfair labor practice strikers entitled to full reinstatement on their unconditional applications for work. See *Mastro Plastics* v. *N.L.R.B.*, 350 U.S. 270, 278; *N.L.R.B.* v. *West Coast Casket Co., Inc.*, 205 F. 2d 905, 907-908 (C.A. 9); *N.L.R.B.* v. *Giustina Bros. Lumber Co.*, 253 F. 2d 371, 373-374 (C.A. 9). Contrary to the Company's intimation (Br. 28), the strikers' status as unfair labor practice strikers depends, not on the Union's belief about that status, but on the propriety of the Board's finding that the company action the employees struck to protest was an unfair labor practice, *supra*, p. 25, n. 11 (R. 27, n. 12). The Company's additional suggestion that the strike might be unprotected because called without notice (Br. 28) lacks both evidentiary (R. 20; 145, 187, 274-275) and legal support. See *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9.

Certificate

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered Brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

STATUTORY APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*,) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * *

Prevention of Unfair Labor Practices

* * * *

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, . . . within

any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file

in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

LIMITATIONS

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Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

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No. 20131

In the

United States Court of Appeals

For the Ninth Circuit

SHATTUCK DENN MINING CORPORATION,
Iron King Branch, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Brief of Petitioner

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Brief of Petitioner

JURISDICTION

Pursuant to Section 10(f) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.) hereinafter the Act, Shattuck Denn Mining Corporation, Iron King Branch, filed its Petition to Review and Set Aside the Decision and Order of the National Labor Relations Board issued March 31, 1965, against petitioner. (R. 39-42)* By that Decision and Order the Board found petitioner to have violated Sections 8(a)(1) and 8(a)(3) of the Act. (R. 37-38)

Respondent filed its Answer and cross-petitioned to enforce the Order of the Board. (R. 47-48)

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*The Transcript of Record is referred to by references in parenthesis to R. The Reporter's Transcript is referred to by references in parenthesis to T.

HISTORY OF THE CASE

These proceedings originated in a charge filed by Local 942 of the International Union of Mine, Mill and Smelter Workers on May 8, 1964, charging that petitioner discharged Nick Olvera because of his union activities. (R. 3) An amended charge was filed by the Union on May 13, 1964, adding a charge that petitioner refused to reinstate a number of employees who had engaged in an unfair labor practice strike. (R. 4)

On the basis of the above charge and amended charge filed by the Union, a complaint was issued on July 1, 1964 in Case No. 28-CA-1085 alleging that petitioner had violated Sections 8(a)(1) and 8(a)(3) of the Act. (R. 5-8) Petitioner filed an Answer denying the commission of any unfair labor practices. (R. 11-12)

A second amended charge was filed by the Union on July 7, 1964, repeating the allegations of the original and first amended charges and adding the charge that petitioner had discharged two employees because of their participation in the strike. (R. 9-10)

A hearing was held before Trial Examiner Louis S. Penfield on August 4 and 5, 1964 in Prescott, Arizona. (R. 11-12) The Trial Examiner found, in his Intermediate Report dated December 17, 1964, that petitioner had violated Section 8(a)(3) of the Act by discharging employees Nick Olvera and Lupe Jaime; that petitioner had engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act in refusing to reinstate certain strikers found by respondent to be unfair labor practice strikers; that petitioner had engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act. (R. 13-33)

The recommended Order of the Trial Examiner, declaring the above-stated matters to be unfair labor practices within the meaning of Sections 8(a)(1) and 8(a)(3) of the Act, was adopted by the Board, and petitioner was ordered to cease and desist from: (a) discouraging Union membership by discharging or otherwise discriminating against employees; (b) interfering with, restraining, or coercing employees in their right to self organization and other Union activities, or to refrain from such activities. Affirmatively, petitioner was ordered to offer reinstatement to employees Olvera and Jaime, with back pay; to offer reinstatement to all strikers denied reinstatement because permanently replaced, with back pay; to post the usual notices and notify the Board of compliance with the foregoing. (R. 37-38)

STATEMENT OF FACTS

Shattuck Denn Mining Corporation, Iron King Branch, (hereinafter referred to as "petitioner" or "Company") has operated an underground lead and zinc mine and mill at Humboldt, Arizona, since approximately 1942. During this period there have been several Unions authorized as bargaining agent to represent the production and maintenance employees of the Company. The Federal Labor Union represented the employees from 1946 to 1958 when the United Steelworkers of America won the bargaining rights. The Steelworkers Union was bargaining agent until April, 1964 when the International Union of Mine, Mill and Smelter Workers (hereinafter referred to as "Union") won the bargaining rights as the result of a National Labor Relations Board election held on March 25, 1964. (T. 13)

Although the Steelworkers contract had been terminated, the Company and Mine-Mill officials agreed on a procedure for handling grievances in steps up to the manager's level. (T. 250-251)

On April 9, 1964, the Union sent a letter to the Company giving the names of 29 employees, out of a total of approximately 200 employees, who had been elected to serve as temporary officers and stewards. (General Counsel's Exhibit No. 3) A short time later the Company was given the names of three or four more stewards. (T. 61, 193-194)

Six or seven grievances were filed during the weeks following Mine-Mill's certification and were handled in the routine manner.

On April 22, 1964, at the conclusion of a General Manager's hearing to discuss a number of safety grievances, Union President Covey handed Manager Dan Kentro and Acting Mine Superintendent Curtis Sundeen a grievance which alleged:

> "Foreman using abusive language and threatening complainant, an officer and steward of local union. Union requests that this foreman be reprimanded and this practice stopped immediately." (General Counsel's Exhibit No. 2)

This grievance was not discussed at that time but was investigated during the next few days by Manager Kentro. Acting Mine Superintendent Sundeen was directed to look into the grievance and he obtained a written statement from the Supervisor involved, Shift Boss Derek Channon. During the course of his investigation, Manager Kentro learned that Shift Boss Channon, who had been a boss for only two or three months, had given an order to Shaft Leadman Tony Portural to blast a missed hole in the shaft, whereupon Portural's partner, Shaftman Nick Olvera, said "No, no, no" indicating that he did not want to comply with the order to blast. (Before the Trial Examiner, Olvera for the first time injected that he also said "lunch time", meaning he wanted to wait until then.) (T. 20-22, 265-266)

Upon having his direction to Shaft Leadman Portugal countermanded, Channon and Olvera had an exchange of words and Olvera was assigned to clean ditches and break boulders on the grizzly. The blast was delayed for approximately an hour. (T. 155)

Manager Kentro scheduled a hearing on the grievance on April 28, 1964. At the grievance meeting on April 28, 1964, Mr. Kentro advised the Union that it appeared that something much more serious than the original grievance was involved, as the facts indicated that Nick Olvera had been guilty of insubordination. The incident was thoroughly discussed at that time and all of the principals, Olvera, Portugal and Channon, were present and gave their versions of what had occurred.

Upon hearing the evidence, Mr. Kentro stated that it seemed obvious that Olvera had interfered with the Shift Boss' order and that the blast was delayed for approximately an hour because the supervisor's direction had not been carried out. Therefore, Mr. Kentro concluded that Mr. Olvera's action amounted to insubordination, a dischargeable offense. (T. 266-270)

Mr. Kentro said he would consider the case overnight, which he did, and Olvera was given his discharge slip on April 29, 1964. (T. 270) (General Counsel's Exhibit No. 6)

Later that same day a grievance was filed by the Union on behalf of Olvera. The nature of the grievance alleged: "Unjust discharge of Nick Olvera." The remedy sought was: "Reinstatement with full back pay and all rights restored." (General Counsel's Exhibit No. 7)

A grievance meeting was scheduled by Union and Company representatives for May 4, 1964 to discuss the discharge.

In the meantime, rumors were going around the mine that some of the employees might try to stop the operation; so on May 1 Manager Kentro posted a notice advising that operations and production would continue at the Iron King, and that, unless employees had excused absences, they would be considered as having quit and would be dropped from the payroll. (General Counsel's Exhibit No. 9)

A hearing on the grievance arising out of the discharge was conducted on May 4, 1964 and the facts were discussed between Management and union representatives. Both the grievant, Olvera, and his partner, Anthony Portugal, were present and gave their versions of the incident. The union representatives argued that Olvera had not been insubordinate, but did not argue or even suggest that the reason for the discharge was for union activity. At the conclusion of the hearing, General Manager Kentro said that nothing had been brought out which had not already been fully considered, and that his decision was to deny the grievance.

The next morning, with no advance notice to the Company, the Union established a picket line at the entrance to the mine.

On May 7, Mr. Kentro sent letters to all employees advising them that the Company would continue to operate and that replacements would be hired. (Respondent's Exhibit No. 8) The letters to all employees also stated that they would be reinstated if their jobs had not already been filled. Similar statements were made by public announcements in the local newspaper. (Respondent's Exhibit No. 9)

Also, the Company placed advertisements in the newspapers and on radio for job applicants.

On May 8, 1964, a charge was filed by the Union on behalf of Mr. Olvera alleging that he was discharged—

"* * * because of his union activities in support of the International Union of Mine, Mill and Smelter Workers before a National Labor Relations Board election that took place on March 25, 1964, and activities as Union Steward and local union officer." (General Counsel's Exhibit 1(a)) (R. 3)

On May 11, a meeting was scheduled in Phoenix by the Federal Mediation and Conciliation Service in an attempt to settle the strike, but after more than two hours of talks the parties adjourned with no acceptable solution.

The strike ended abruptly the next day, on May 12, when the striking employees, again without advance notice to the Company, offered to return to work. During the strike the Company had continued to operate and many employees remained at work. Also, during the period, the Company hired twenty-three permanent replacements to fill vacancies in the mill and underground caused by the absent strikers. When the strike ended, five mill employees, whose jobs had been permanently replaced, were refused reinstatement and fifteen employees in the lowest classification underground, whose jobs had been filled, were refused reinstatement. (T. 286-287)

On May 9, while the strike was still in progress, Mr. Jack Pierce, the Company's Superferrite Plant Manager, received a telephone call intended for General Manager Kentro. The call was from Mrs. Ernest Rivera, who reported that her husband had been threatened by Mr. Lupe Jaime. Mr. Pierce got word to Manager Kentro of this telephone call and Mr. Kentro went to the Rivera home and talked to Mr. and Mrs. Rivera, who both stated that Mr. Lupe Jaime had been to see Mr. Rivera earlier that day to find out why Rivera "didn't stick with us". When Mr. Rivera said he had eight children and was going to work so long as the Union

had no contract with the Company, Mr. Jaime said that if he continued to work he would get beaten up. (T. 302)

Mr. Kentro suggested that Mr. Rivera get a lawyer and file criminal charges against Mr. Jaime, but Rivera said he did no want to go that far. On May 12, upon his return to work, Mr. Jaime was given a letter signed by Manager Kentro notifying him that he was discharged for his misconduct on May 9, 1964. (General Counsel's Exhibit No. 10)

Mr. Jaime did not question the discharge at the time and did not file a grievance with the Company.

On May 13 the charge against petitioner was amended to include employees alleged to have been refused reinstatement, including Mr. Jaime. (R. 4)

QUESTIONS PRESENTED

The questions involved are:

1. Whether, by discharging Nick Olvera, petitioner engaged in unfair labor practices within the meaning of Section 8(a)(1) and Section 8(a)(3) of the Act.
2. Whether, by refusing to reinstate the strikers who had been permanently replaced during the strike, petitioner engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
3. Whether, by posting the notice on or about May 1, 1964, petitioner has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. Whether by discharging Lupe Jaime, petitioner engaged in unfair labor practices within the meaning of Section 8(a)(1) and Section 8(a)(3) of the Act.

STATUTES AND RULES INVOLVED

Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, as amended, insofar as pertinent, provide:

> "(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:" (61 Stat. 140, 29 USC Sec. 158(a)(1) and Sec. 158(a)(3)

Section 10(c) of the Act provides:

> "(c) . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." (61 Stat. 146, 29 USC Sec. 160(c))

SPECIFICATIONS OF ERROR

1. The National Labor Relations Board erred in finding and concluding that the discharge of Nick Olvera was discriminatory within the meaning of Section 8(a)(3) of the Act and that by discharging Nick Olvera, petitioner engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

2. The National Labor Relations Board erred in finding and concluding that by posting the notice on May 1, 1964, petitioner interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act.

3. The National Labor Relations Board erred in finding and concluding that the strike beginning May 5, 1964 was an unfair labor practice strike and by refusing to reinstate

those strikers unconditionally offering to return to work because replacements had been hired, petitioner engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. The National Labor Relations Board erred in finding and concluding that petitioner discharged Jaime for engaging in protected strike activity and, in discharging him, petitioner violated Section 8(a)(3) of the Act.

5. The National Labor Relations Board erred in finding and concluding that, by interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, petitioner has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The National Labor Relations Board erred in entering its order and any remedy against petitioner.

7. The National Labor Relations Board erred in failing to dismiss the complaint against petitioner in its entirety.

SUMMARY OF ARGUMENT

Respondent bases its findings and conclusions that Nick Olvera was discharged for his union activities on inferences, alone, and not on substantial evidence. Petitioner has the right to discharge employees for cause. Olvera was discharged solely because of insubordination. The General Counsel has the burden of proving by the preponderance of evidence that petitioner's conduct in discharging Olvera was for anti-union motives. There was no such evidence shown here. The fact that Olvera may have engaged in union activities is not enough to warrant that he was discharged for such activities. The evidence fails to show a discriminatory discharge. This is not an arbitration case, nevertheless the Trial Examiner attempts to act as an

arbitrator and substitute his judgment for management's as to proper discipline.

Olvera's discharge was not an unfair labor practice; consequently, the strike to protest his discharge was not an unfair labor practice strike, but, rather, was an economic strike. Petitioner had the right to replace economic strikers with permanent employees and does not have to discharge them to make room for returning strikers.

The notice posted by the Company was not a violation of the Act and had no effect on either Olvera's discharge or the strike. Petitioner repudiated the notice by advising each employee personally that his job was available if a permanent replacement hadn't been hired.

Jaime was discharged because of his illegal activities in threatening a fellow employee during the strike.

The activities of petitioner do not tend to lead to labor disputes obstructing commerce, and no remedy should have been ordered. Instead, the complaint, as amended, in this case should have been dismissed in its entirety.

ARGUMENT

1. The Discharge of Nick Olvera.

This case centers around the discharge of Nick Olvera. In considering his discharge it is well to remember that the Act was not designed to interfere with the rights of employers to control employment conditions in the absence of anti-union motivation. "The Act", the Supreme Court has stated, "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them." *N.L.R.B. v. Jones & Laughlin Steel Co.,* (U.S. Sup. Ct. 1937) 301 U.S. 1, 81 L.Ed. 893, 57 S.Ct. 615.

"The Act permits the discharge for any reason other than Union activity or agitation for collective bargaining."

Associated Press v. N.L.R.B., (U.S. Sup. Ct. 1937) 301 U.S. 103, 81 L.Ed. 953, 57 S.Ct. 650. In general, therefore, a complete defense exists under the Act if the employer can show that the allegedly discriminatory conduct was motivated not by anti-union considerations, but by reasons normally associated with the efficient conduct of his business.

The Act, itself, reaffirms the employer's right to discharge or otherwise discipline employees "for cause". Section 10(c) specifically provides that the Board may not order reinstatement or back pay with respect to employees who have been discharged "for cause".

It goes without saying that the General Counsel has the burden of proving affirmatively by substantial evidence that petitioner's conduct in discharging Olvera was motivated by anti-union considerations. *N.L.R.B. v. Montgomery Ward & Co., Inc.*, (8 Cir. 1946) 157 F.2d 486. It is not up to the defendant to prove non-discrimination. *Indiana Metal Products Corp. v. N.L.R.B.*, (7 Cir. 1953) 202 F.2d 613.

Substantial evidence means such evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co. v. N.L.R.B.*, (U.S. Sup. Ct. 1938) 305 U.S. 197, 83 L.Ed. 126, 59 S.Ct. 206.

It is settled that when an employee is discharged for reason of his union activities it makes no difference whether he is also guilty of insubordination. The discharge is a violation of Section 8(a)(3) of the Act. Petitioner does not quarrel with the Board's contention that the law is violated if insubordination is used as a pretext for discharging a union adherent, but petitioner urges that there is no competent evidence in this case to support a finding that Olvera was unlawfully discharged on the basis of a pretext.

The facts show that Olvera was insubordinate. His Shift Boss had given a direct order and Olvera countermanded his order. The record is clear that such an incident occurred. Clearly, Olvera interfered with the Shift Boss' order; the Boss got the impression that his orders were countermanded by Olvera; and the blast was delayed, slowing progress in the shaft.

Upon learning of this incident, Manager Kentro discharged Olvera for insubordination—*and for no other reason.* The important thing here is that *management believed Olvera had been insubordinate.* Kentro genuinely felt that Olvera had attempted to break down the authority of a new boss. He testified:

> "* * * it seems to me some misunderstanding regarding the authority of the shift bosses, I just wanted to be sure this was clear in everybody's mind, and I outlined the shift bosses were supervisors acting for management on the property and their orders were to be obeyed."
>
> "* * * from all that I could find out and had been able to find out, that Mr. Olvera had interfered with the orders given by the shift boss, that in effect by changing the orders he had not only interfered with the orders of the shift boss but he held up another man from doing his job." (T. 261-262)

There are numerous arbitration awards sustaining discharges in similar instances. Insubordination does not have to follow a "pattern", as suggested by the Trial Examiner. (R. 22) Nor does it have to be accompanied by expressions of "defiance". (R. 22) It may consist of an argumentative reluctance to work. Many arbitrators have ruled that an industrial plant is not a debating society and refusal to obey an order *promptly* is insubordination.

This, of course, is not an arbitration case; however, we feel that the facts show that Olvera was insubordinate and that management had reasonable grounds to believe he was insubordinate.

We submit that it was error as a matter of law for the Board to ignore this and look further for motives for his discharge. There is positive, uncontroverted testimony from Manager Kentro, who made the decision to discharge Olvera, that his union activities had nothing whatsoever to do with his discharge. (T. 270) At the hearings conducted on April 28 and May 4, there had been no mention of discrimination, but the dispute centered entirely around the insubordination incident itself and whether the penalty should be so severe.

In finding that petitioner was in violation of Section 8(a)(3) of the Act, the Board rejected Manager Kentro's testimony entirely and concluded that Olvera was discharged for his union activity.

The Trial Examiner has based his findings and conclusions on inferences alone. He finds that petitioner *must have* committed an unfair labor practice by discharging Nick Olvera because he was a temporary union officer. He finds that petitioner *must have* had an illegal motive because to him the penalty for the offense seems too severe and would "serve as a warning to the Union," * * * "and at the same time challenge and weaken it." (R. 25) He accepts as fact a statement of one witness, who testified that Manager Kentro stated at a grievance meeting that the Union was filing too many trivial grievances, so finds that the Company *must have* discharged Olvera because he filed grievances.

Olvera had not been active for Mine-Mill in the organizational campaign insofar as the Company knew. (T. 270) Mr.

Olvera, himself, admitted he had not been very active in the campaign and he didn't know if the Company management even knew which side he favored. (T. 68) His partner stated that Mr. Olvera had not been particularly active during the recent National Labor Relations Board election. (T. 157) The Company has never taken sides in representation elections and management had kept strictly neutral in the recent election involving Mine-Mill and the Steelworkers. (Respondent's Exhibits 1, 2 and 3)

The fact that Olvera had been named a temporary union officer had absolutely nothing to do with his discharge. Olvera had previously been a union officer with the Steelworkers Union and handled numerous grievances with the Company over the past years. He has also been on negotiating committees with the predecessor Union. (T. 11, 65-67) So, it is not surprising that he would continue to act as Steward or officer for the newly certified Mine-Mill Union.

Olvera assisted in presenting grievances for the Union along with several other employees. However, the Chairman of the Grievance Committee, Local President and other employees did as much or more in presenting grievances for the Union as did Olvera. There had been no animosity between management and Mr. Olvera during any grievance meetings he attended either before or after Mine-Mill became certified. His relations with management have always been excellent. (T. 66, 271) The fact that the Company and the Union, including Mr. Olvera, were getting along well is evidenced by a letter from Olvera and the safety committee delivered to Kentro on April 28, stating their appreciation for Kentro's cooperation. (Respondent's Exhibit No. 5) Thus, it can be seen that there was no motive for the Company to discharge Mr. Olvera because of his activi-

ties in handling grievances, or for his alleged activities in the representation election.

An employee's "union activity", in itself, is no bar to discharge so long as the discharge is not motivated by a desire to encourage or discourage union membership, or to discriminate for such union activity.

This Court has said:

> "Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantiated to support a finding. The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as a result of such activities. There must be more than this to constitute substantial evidence." *N.L.R.B. v. Citizens-News Co.,* (9 Cir. 1943) 134 F.2d 970, 974.

Similarly, in *N.L.R.B. v. Montgomery Ward & Co., Inc.,* supra, the Court said:

> "Fragmentary and unrelated suspicions are not sufficient in substance to transform a proper exercise of discharge into an improper one. American Smelting & Refining Co. v. N.L.R.B., (8 Cir. 1942) 126 F.2d 680; N.L.R.B. v. Sheboygan Chair Co., (7 Cir. 1942) 125 F2d 436."

In *N.L.R.B. v. McGahey,* (5 Cir. 1956) 233 F.2d 406 at page 413, the Court said:

> "The employer does not enter the fray with the burden of explanation. With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was its cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful

motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one. * * *"

Similarly, see *N.L.R.B. v. Rickel Bros., Inc.,* (3 Cir. 1961) 290 F.2d 611.

This case comes squarely within the purview of the recent case of *N.L.R.B. v. Ace Comb Company,* (8 Cir. 1965) 342 F.2d 841 at page 847, where it was held that the N.L.R.B is not justified in drawing an inference that an employee was discharged by reason of his union activities where lawful cause existed for the discharge of the employee.

> "It has long been established that for the purpose of determining whether or not a discharge is discriminatory in an action such as this, it is necessary that the true, underlying reason for the discharge be established. That is, the fact that a lawful cause for discharge is available is no defense where the employee is *actually* discharged because of his Union activities. *A fortiori,* if the discharge is *actually* motivated by a lawful reason, the fact that the employee is engaged in Union activities at the time will not tie the employer's hands and prevent him from the exercise of his business judgment to discharge an employee for cause. Fort Smith Broadcasting Co. v. N.L.R.B., 341 F.2d 874 (8 Cir. 3/4/65). * * * It must be remembered that it is not the purpose of the Act to give the Board any control whatsoever over an employer's policies, including his policies concerning tenure of employment, and that an employer may hire and fire at will for any reason whatsoever, or for no reason, so long as the motivation is not violative of the Act."

The Trial Examiner speculated that the April 21 incident would not even have come to light if the abusive language grievance had not been filed. (R. 25) The fact that the manager learned of Olvera's insubordination after a griev-

ance had been filed is incidental. It could have come from any other source and the results would have been the same. Channon, the Shift Boss, had just been made a boss by promotion from the bargaining unit. (T. 267-268) If he had been an experienced supervisor and taken immediate disciplinary action at the time, the Union would have doubtless asserted that his action was hasty and would have filed a similar unfair labor charge as here in order to force the Company to reduce the penalty.

The Trial Examiner found that this grievance was the "last of a series filed in rapid order by the newly certified Union." (R. 25) There is no evidence that this was the last of a series of grievances, or even that there had been a large number of grievances filed. Actually, the Union had filed only six or seven grievances since certified.

The Trial Examiner concluded that Manager Kentro was displeased at the Union for filing too many small grievances. (R. 25). The record on this points shows that one witness, Portugal, commented that "He said we was turning in too many grievances, small grievances that didn't amount to much, or something like that, and he didn't like it." (T. 136) The Trial Examiner attaches the utmost weight and credibility to this isolated statement in the record. However, the answer by Portugal was not responsive to the question asked and was not given any particular significance during the hearing. It was not pursued further by Counsel for General Counsel, either from this witness or from Olvera or from any others.

Portugal's testimony was shown to be unreliable. He stated that Channon had been a boss for two or three years and that he had worked for Channon for eight months, when, in fact, Channon had only been a boss for slightly more than two months. (T. 157, 267-268)

Olvera and Union President Covey went into detail concerning the grievance meeting of April 28th and neither of these principal witnesses made any mention of Kentro having said too many trivial grievances had been filed, even though both were asked to state specifically what Kentro had said. (T. 37-47, 177-180)

Furthermore, even if Kentro had made such a statement, it would not establish any hostile motive. No reasonable inference of opposition to the Union or particularly to Olvera can be drawn from this isolated testimony from Portugal. It is not "substantial evidence". There is no evidence that there was any threat or anger attached to the alleged statement. If such a statement had been made it would merely show an expression from Manager Kentro that he thought some grievances were trivial, which they well might have been. This doesn't establish an illegal motive! The Act certainly does not forbid honest and forthright expression or discussion between company and union representatives. This Court, in *Wayside Press v. National Labor Relations Board,* (9 Cir. 1953) 206 F.2d 862 at page 864, quoted with approval the following statement from *Sax v. N.L.R.B.,* (7 Cir. 1948) 171 F.2d 769, 773:

> "Mere words of interrogation or perfunctory remarks not threatening or intimidating in themselves made by an employer with no anti-union background and not associated as a part of a pattern or course of conduct hostile to unionism or as part of espionage upon employees cannot, standing naked and alone, support a finding of a violation of Section 8(1)."

Inference piled on an inference is not a substitute for evidence. *N.L.R.B. v. Miami Coca-Cola Bottling Company* (5 Cir. 1955) 222 F.2d 341, 344. Furthermore, the Board cannot create inferences where there is no substantial evi-

dence upon which they may be based. *N.L.R.B. v. Kaiser Aluminum & Chemical Corp.,* (9 Cir. 1954) 217 F.2d 366.

As we have mentioned, this is not an arbitration case. Nevertheless the Trial Examiner set himself up as an arbitrator of the proper punishment to be administered Olvera. He saw the incident of insubordination as "relatively minor". (R. 26) In the words of the Trial Examiner, Manager Kentro "readily could have made his point by a lesser penalty." (R 25) In effect, the Trial Examiner admits that some lesser penalty might have been proper, but not discharge. On this point, the Court in *N.L.R.B. v. Ace Comb Company,* supra, said (342 F.2d 841 at page 847):

> "In this connection, we, of course, disregard the Examiner's findings as to the severity of the action in relation to Woodliff's behavior, and say, once it is determined that disciplinary action is warranted the extent of the action taken is purely within the discretion of the employer, and the Board may not substitute its judgment for that of the employer."

The Trial Examiner has attempted to substitute his judgment for the judgment of employer as to proper discipline although the courts have held that such is not permissible. For instance, it has been held that the Board may not limit an employer's right to discharge by holding that the misconduct alleged as grounds for the employee's discharge was excusable or that the discharge was too severe a penalty, *N.L.R.B. v. Coats & Clark, Inc.,* (5 Cir. 1956) 231 F.2d 567, and that the N.L.R.B. may not substitute its judgment for that of an employer as to sufficiency of cause of discharge. The decision of whether or not to discharge an employee is up to management. *Osceola County Cooperative Creamery Association v. N.L.R.B.,* (8 Cir. 1958) 251 F.2d 62. In *N.L.R.B. v. Montgomery Ward & Co.,* supra, (157 F.2d 486 at page 490) the Court held,

"* * * In considering the propriety of these discharges the question is not whether they were merited or unmerited, just or unjust, nor whether as disciplinary measures they were mild or drastic. These are matters to be determined by the management, the jurisdiction of the Board being limited to whether or not the discharges were for union activities or affiliations of the employees."

In this connection, the following quotation from *N.L.R.B. v. McGahey,* supra, is pertinent (233 F.2d 406 at pages 412-413):

"The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretence, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids."

The Trial Examiner concludes that the discharge "was to discourage the Union's continued filing of grievances and its aggressive pursuit of bargaining." (R. 26) His conclu-

sions are based on suspicion alone without any foundation in the record. Contrary to Trial Examiner's findings, there was no "aggressive pursuit of bargaining" at this time. In fact, bargaining had not begun, and had not even been requested yet by either party and negotiations for a written agreement were *not* under way. (T. 50)

The entire record clearly establishes that *there has never* been the presence of an anti-union attitude in petitioner's history. The Company has always remained entirely neutral in union organizational campaigns and Kentro, personally, has never displayed any anti-union sentiment in all his mining career. (T. 246-250) He had no disputes with either the Mine-Mill Union or with Olvera personally, and, in fact, Kentro and Olvera were good friends. (T. 66, 271)

The employer is entitled to have its conduct considered in the light of this history, with its complete absence of hostility to the Union, *Pacific Gamble Robinson Co. v. N.L. R.B.,* (6 Cir. 1950) 186 F.2d 106.

In the case of *N.L.R.B. v. Huber Motor Express, Inc.,* (5 Cir. 1955) 223 F.2d 748, the Court ruled that the Board may not infer an unlawful motive for employer's conduct if it could just as reasonably infer a lawful motive. The fact that Olvera was shown in the hearing to have engaged in union activities prior to his discharge is not enough, in itself, to support a finding by the N.L.R.B. that he was discriminatorily discharged. In *N.L.R.B. v. Arthur Winer, Inc.,* (7 Cir. 1952) 194 F.2d 370, wherein it was held that in the absence of evidence of anti-union background a finding that employees were unlawfully discharged was not justified where causes for the discharges alleged by the employer were adequate to justify discharges, the employer believed that such causes existed, and other employees who had engaged in union activities had not been discharged.

Respondent completely ignored one of the most significant factors in refuting any inference of illegal motive. That is, *the Union representatives at no time prior to the strike ever accused the Company of discriminating against Olvera for any alleged union activities.*

The grievance following Olvera's discharge gave as the nature of the grievance only: "Unjust Discharge of Nick Olvera." (General Counsel's Exhibit No. 7) No claim was made that the discharge was discriminatory.

At the hearing, preceding the discharge on April 28, and again at the meeting between Company and Union officials to review the case on May 4, there was no assertion that Mr. Olvera was discharged for union activity. The case was a dispute strictly on the merits of whether or not Mr. Olvera's actions amounted to insubordination and whether discipline so severe as discharge was warranted. The Union suggested at the hearing of May 4, 1964, that there might have been a "misunderstanding" of the order from the Supervisor, but not that there had been any discrimination. (T. 273) Manager Kentro testified that there had been no mention of union discrimination. (T. 279) Union President Covey's testimony during the hearing confirms this.

> "Q. At the meetings that you attended prior to the time of the strike, was there any discussion whatsoever that Mr. Olvera was being mistreated because of any alleged Union activities?
>
> A. No, there wasn't.
>
> Q. There was no mention of that?
>
> A. No mention.
>
> Q. Did you as president of the Union and the Union in turn feel that Mr. Olvera actually hadn't countermanded his boss and therefore was unjustly discharged and that that was the reason you struck?
>
> A. That's the reason we struck because we thought he was unjustly discharged.

Q. And when you said 'unjustly discharged', you used that in your grievance, you felt that he hadn't been insubordinate isn't that the case?

A. He hadn't been insubordinate.

Q. I refer to Exhibit No. 7, your name appears as signing General Counsel's Exhibit No. 7, have you got it there?

A. This is it.

Q. The nature of the grievance is spelled out, unjust discharge of Nick Olvera. Was it your intention, speaking now as president of the Union, that he wasn't guilty of insubordination?

A. That's true. He was not guilty.

Q. Now, is that solely the reason why the Union struck?

A. That is the reason the Union struck." (T. 202-203)

Olvera, himself, testified that insubordination was the sole issue discussed during the processing of the grievance and no allegation of discrimination was ever raised. (T. 78-81)

The Trial Examiner chooses to disregard this testimony with the statement—"An unjust discharge may or may not be unlawful, but the manner in which persons not versed in *legal niceties* characterize it is not determinative." (R. 25) We point out that during the meetings with the Company on the grievance, the Union had present not only its local officers, but representatives of the International Union as well. These experienced Union representatives may not be "versed in legal niceties", but if they had any thoughts whatsoever that discrimination was the basis for the discharge they would have immediately accused the Company of discrimination, and *in no uncertain terms*. However, the belated accusation of discrimination came several days after the strike, when the Union representatives realized their

attempt to force the Company to reduce the penalty had failed.

There being no substantial evidence to support the Board's findings, its Decision and Order should be set aside. The landmark case on the substantiality of evidence requirements is *Universal Camera Corp. v. N.L.R.B.,* (U.S. Sup. Ct. 1951) 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456. The findings of fact made by the Board must be "supported by substantial evidence on the record considered as a whole. * * *"

Where substantial evidence is not in the record, the Board's order should be set aside. In *N.L.R.B. v. Audio Industries, Inc.,* (7 Cir. 1963) 313 F.2d 858, the 7th Circuit applied the standards laid down by the Supreme Court in *Universal Camera Corporation v. N.L.R.B.,* supra, and rejected the Trial Examiner's findings as to discriminatory discharge of five employees as being unsupported by substantial evidence in the record as a whole. In denying enforcement of the Board's Order, the Court held that the Board was not warranted in finding violation of the Act where the Trial Examiner and the Board erred in ignoring largely uncontroverted testimony as to legitimate reasons for discharges and in substituting their judgment for what are basically managerial decisions, and, furthermore, in basing findings upon two isolated incidents of dubious significance that supposedly demonstrated the employer's anti-union bias.

In *Farmers' Co-operative Co. v. National Labor Relations Board,* (8 Cir. 1963) 208 F.2d 296, the Court, after examining the holding of the Supreme Court in *Universal Camera Corporation v. N.L.R.B.,* supra, concluded, at page 299,

> "We are not barred from setting aside the Board's decision if we 'cannot conscientiously find that the evi-

dence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view'."

The Court denied enforcement of the Board's order, saying,

"A fair consideration of the record is convincing that the finding that petitioner violated Section 8(a)(1) of the Act and/or Section 8(a)(3) is not supported by 'substantial evidence on the record considered as a whole'."

It is urged that there is not substantial evidence in the record considered as a whole on which to base a lawful finding that Olvera was discharged for union activities.

2. The Notice Posted by Petitioner.

There was no anti-union motive behind the notice to employees which Manager Kentro posted on May 1, 1964.

Following Mr. Olvera's discharge on April 28, 1964, there were rumors that some individuals might attempt to stop the operation of the mine. So, on May 1, 1964, Mr. Kentro posted a notice stating that he had heard such rumors and advising that the Company would continue operations and production. The notice went on to state that employees were expected to report for work and employees who failed to report for work would be considered as having quit and would be dropped from the payroll. (General Counsel's Exhibit No. 9)

The Trial Examiner finds that the notice constituted an unlawful threat of discharge to employees who were considering a strike. (R. 27) The evidence shows there was no discussion of the Union calling a strike until several days after the notice, and even then the Company had not been

advised by the Union that there would be a strike. (T. 293, 295) The fact that a few employees might take it upon themselves to "stop production" is not the same as concerted strike action by the Union. Manager Kentro testified that the purpose of his notice of May 1 was to let these employees know that the employer would strictly enforce its absenteeism rules. It contained no threat to discharge anyone for participating in a strike.

The Trial Examiner says "we must consider its effect in terms of its impact on employees contemplating a strike." There is no evidence that anyone paid any attention to the notice and it had absolutely no effect on the employees' determination to go on strike. Furthermore, the Trial Examiner overlooks the fact that at the time the notice was posted (May 1), the Olvera grievance was still being processed. A grievance meeting had been scheduled for May 4 at the General Manager's level to discuss the discharge, in keeping with the agreement between the Company and the Union that grievances would continue to be handled as they had in the past under the Steelworkers contract. Any contemplated strike at that time, prior to exhausting the grievance procedure, would certainly have been in violation of this agreement.

If it were argued that the notice was technically a violation, the Company in effect repudiated the notice on May 5, the day the strike began, by making its position very clear in letters to each employee, newspaper ads and via radio that the employees' jobs were available, provided the Company hadn't permanently filled them. (T. 280-282) (Respondent's Exhibit No. 8) See *Kansas Milling Co. v. N.L.R.B.*, (10 Cir. 1950) 185 F.2d 413.

3. Replacement of Economic Strikers.

As we have pointed out, contrary to the finding of the Trial Examiner and Respondent, the discharge of Olvera was not discriminatory and was not an unfair labor practice. Consequently, the strike was not an unfair labor practice strike. Rather, it was a strike to force the Company to lessen the discipline against Olvera. Not having been caused or prolonged by an unfair labor practice, the strike was an economic strike.

The law is clear that the employer has the right to replace economic strikers with other permanent employees, and does not have to discharge them to make room for the returning strikers. See *Kansas Milling Co. v. N.L.R.B.,* supra; *N.L.R.B. v. Mackay Radio & Telegraph Co.,* (U.S.Sup.Ct. 1937) 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381. The discharge of Olvera was not an unfair labor practice and the strike following was not an unfair labor practice strike. The petitioner, therefore, was under no obligation to discharge the permanent replacements in favor of the returning strikers.

Again we note that at no time prior to the filing of the charge by the Union had it ever been suggested that Olvera was discharged for his union activity, or that the strike was to protest a discriminatory discharge.

There is a question whether the striking employees here were even engaging in a protected concerted activity when they struck, inasmuch as they gave no notice of such intention to strike. See *N.L.R.B. v. Washington Aluminum Co.,* (4 Cir. 1961) 291 F.2d 869.

4. The Discharge of Lupe Jaime for Misconduct.

Lupe Jaime was discharged for misconduct in connection with the strike. The evidence shows that he went to

see Ernest Rivera to find out "why he didn't stick with us." His statements to Rivera were to the effect that Rivera would get beaten up if he continued to work.

At the time of the incident the Riversas went out of their way to report it to management. Manager Kentro talked to the Riveras and there was no doubt at that time that Jaime had, in fact, threatened Rivera. Jaime was not discharged for his strike activity, and Kentro did not use the threat "as a pretext to retaliate against him as a striker" as found by the Trial Examiner. (R. 28) He was discharged because he, in fact, threatened a co-worker. There certainly was no possible motive shown to retaliate against him. Jaime was a very competent miner, who had little or nothing to do with the strike. (T. 228)

The law is well established that the employer has the right to refuse reinstatement when the striker has actually been guilty of misconduct during a strike. *N.L.R.B. v. Fansteel Corporation,* (U.S.Sup.Ct. 1938) 306 U.S. 240, 258, 59 S.Ct. 490, 83 L.Ed. 627; *N.L.R.B. v Thayer Co.,* (5 Cir. 1954) 213 F.2d 748. Jaime's conduct was coercive in nature and calculated to instill fear of physical harm in the non-striker victim, Rivera. Such activity is not protected under the Act. In this case there was an effective implied threat of bodily harm. This was not a case of honest but mistaken belief that the employee had been guilty of misconduct, as was *N.L.R.B. v. Burnup and Sims, Inc.,* (U.S. Sup.Ct. 1964) 379 U.S. 21, 85 S.Ct. 171, 13 L.Ed. 2d 1.

CONCLUSION

Congress intended that the rights of the employer be as jealously guarded as those of the employee. Petitioner is a small mining company with an unblemished history of excellent labor relations and this history should be given

the utmost consideration. There should be a presumption that Petitioner acted lawfully with the burden on the General Counsel to prove affirmatively by substantial evidence otherwise. This has not been established.

For the foregoing reasons, it is respectfully submitted that the Board's Decision and Order be set aside and the Complaint issued in this case be dismissed in its entirety.

Respectfully submitted,

TWITTY, SIEVWRIGHT & MILLS

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Dated: September 1, 1965

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RALPH B. SIEVWRIGHT

(Appendix Follows)

Appendix

INDEX TO EXHIBITS

General Counsel's Exhibits	Marked	Identified	Offered	Received
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No. 20128

In the

United States Court of Appeals

for the Ninth Circuit

DAVID S. McDANIEL, doing business as McDaniel Plumbing & Heating Company,
Appellant,

vs.

ASHTON-MARDIAN COMPANY (Joint Venture), and TRAVELERS INDEMNITY COMPANY, a corporation,
Appellees.

Appellees' Brief

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Appellees' Brief

STATEMENT OF FACTS

Appellees were defendants in the trial court and will adopt appellant's style of referring to themselves as a singular defendant (meaning in all instances Ashton-Mardian Company, the joint venture, since the defendant bonding company is a passive defendant), and to appellant as plaintiff.

Defendant controverts the statement of facts contained in plaintiff's brief only to the extent of stating as clearly and affirmatively as it knows how, that it believes the following are established facts which are important here in order to properly present the case and their argument.

1. The delay, which is the subject matter of plaintiff's claim, was not caused by any wrongful act or default of defendant, but resulted entirely from changes ordered by the United States (T. 27, T. 33).

2. The changes required by the United States in which time extensions were granted were changes which the United States had a right to make and defendant had a duty to perform and were not "cardinal changes."*

3. The defendant did not guarantee or warrant that plaintiff would be able to complete its subcontract within any certain period of time.†

Each of these matters is decided by the trial court which had before it the stipulation of the parties, in which they agreed on certain facts, and the exhibits consisting of all the lengthy presentation to the various administrative boards and their decisions which were attached thereto for whatever purpose the trial court might make of them and from which it must have determined its findings. None of the facts stated above are specified as error by plaintiff, but except for quoting the decision of the trial court they are not otherwise set forth as such in the plaintiff's statement of the case and he seems to ignore their existence throughout his argument, as, for example, in his argument I (page 13) where he states: "Any contractor delayed in his work *by action of the other contracting party . . .*" (Emphasis supplied.) This is obviously contrary to fact 1 as stated above.

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*Decision of the Engineers Board, Exhibit 9, to the stipulation, which holds, with reference to Change Order 4 (the Arctic Tower), on page 19, "no 'cardinal change' is involved," and on page 20 the same with reference to Change Order 5 (the changed sub-soil condition), which is affirmed by the decision of the Armed Services Board, Exhibit 16, page 7. Also T. 33.

†General contract, Exhibit 1; subcontract, Exhibit 2, T. 32.

SUMMARY OF ARGUMENT

After attempting other approaches the defendant believes its argument is most clearly presented by an analysis of plaintiff's argument in the approximate same order as presented in his brief.

On page 12 thereof he lists the only two questions involved in this appeal as follows:

> "1. If a subcontractor agrees to do work for a general contractor within a fixed period of time, and is thereafter required to extend his services for a much longer time at loss to himself and without his own consent or benefit, is he entitled to recovery for the delay?"

Defendant's answer to this question is negative unless there is added thereto, as plaintiff does in his argument, the phrase, "from the party legally responsible for the delay which causes the damage," or other language having the same meaning. *The delay in this case was not caused by the defendant.* And legal responsibility must be found in contract or tort. *Neither is present here.*

> "2. If the foregoing question may be answered in the affirmative as a general principle, is there anything in this contract, or on these facts, to take this case out of the general rule?"

Defendant believes the following facts assumed in the first question are not present in this case by reason of the parties' contract and the facts:

a. There was no fixed period of time.

b. The plaintiff did consent to delay (first, and most important, in the contract; second, at the time of the changes which produced the delay).

c. Plaintiff did benefit.

These reasons are of course in addition to the defenses that the delay was not caused by defendant and that the con-

tract contains no provisions for such damages, nor can they be implied.

ARGUMENT

Replying to plaintiff's argument, it is noted that in his summary (page 12), he states the general principle of law upon which he relies to be that a subcontractor is entitled to recover delay damages regardless of their cause. However, when he begins his actual argument on page 13, he adds the language, "by virtue of the act of the other contracting party." Plaintiff does not cite, nor has defendant found, any decisions which state this legal proposition without at least the latter qualifying language. Plaintiff's own quotations appearing in his brief each contain such language. On page 13, the quotation from Corbin (5 Corbin on Contracts 429), ". . . due to the owner's causing unreasonable delay . . ." The reference is of course to the claim of a general contractor against an owner. In the quotation from *Grand Trunk Western R. Co. v. H. W. Nelson Co.,* 116 F. 2d 823, ". . . when without his fault the other party, during the progress of the work, delays it . . . by the action of the party at fault," and on page 14 in the quotation from *Northeast Clackamas C. E. Co-op v. Continental Cas. Co.,* 221 F. 2d 329, ". . . the owner cannot delay or retard the contractor . . . and, if through the act or omission of the owner . . .", and finally in the quotation from *Frank T. Hickey, Inc. v. Los Angeles Jewish Com. Coun.,* 276 P. 2d 52, ". . . the contractor who is in control of the work being performed."

The recent Wyoming decision cited by plaintiff, *Studer v. Rasmussen,* 344 P. 2d 990 (Wyo., 1959), which is almost exactly in point since it involves a subcontractor plaintiff and a contractor defendant, a Federal government contract, and a claim for delay damages, states clearly at page 997

of the Pacific Report: "We may concede that if the appellants (the contractor) had been hindered in their work by the government or by circumstances beyond their control, then no damage should have been awarded." The decision awarding the subcontractor damages turns on a finding (not present here) that the contractor was negligent, and therefore in breach of the subcontract.

We therefore proceed with our argument based on the affirmance of this proposition only with the additional language added thereto.

Next, plaintiff states in his argument II that the trial court erroneously failed to apply the general rule as stated in his argument I. At this point, he recognizes both in his summary and in the argument following that his general rule does not apply if a party has waived it. Whereas, it is our position that he did so waive any right to recover under this principle, it is first of all defendant's contention that he does not come within the application of the principle in the first instance because the delays were not caused by any acts of the defendant.

Enlarging upon the point just made, the trial court found that the defendant's delay was caused by change orders which the government had the right to make and which the defendant was bound to perform, and we believe plaintiff now concedes this. The provisions of the general contract (Exhibit 1, General Provisions, Clauses 3, 4 and 5), giving the government this right, have been considered in many decisions and it is well settled that they will be enforced, and that the government, by virtue thereof, may make changes which are within the general scope of the contract (Clause 3) or necessitated by changed conditions (Clause 4), and incur no liability for delays by reason thereof, excepting only an equitable extension of the time for performance (Clause 5).

United States v. Rice, 317 U.S. 61, 63 S. Ct. 120, 87 L. Ed. 53, which held that the changes made pursuant to similar contract provisions did not breach the contract, and that the right to make the changes was a part thereof, and any damage by reason of delay caused thereby was not compensable except that the government would be required to extend the time for completion.

Choteau v. United States, 95 U.S. 61, 24 L. Ed. 371, which held that the government would be liable for the reasonable cost and expenses of the changes made but not for damages for delay occasioned thereby.*

United States v. Foley, 329 U.S. 64, 67 S. Ct. 154, 91 L. Ed. 44. This decision overruled the Court of Claims which had permitted the contractor to recover for damages due to delay extending beyond more than twice the original time contemplated.†

Also see *Wells Bros. Co. of New York v. United States,* 254 U.S. 86, 65 L. Ed. 148, 41 S. Ct. 34, *Brooker Engineering Co. v. Grand River Dam Authority,* 144 F. 2d 708, *C. A. Hooper v. United States,* 40 F. Supp. 491 (1941).

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*The Choteau decision states in part at page 373 of the L. Ed. opinion: "It is very clear that both parties contemplated the probability that the work would not be completed at the precise period of 8 months from the date of the contract. They also contemplated that changes would be made. . . . They made such provision for these matters as they deemed necessary for the protection of each party. For the reasonable costs and expenses of the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed no provision was made."

†Page 155 of the 67 S. Ct. Report: "Here, as in the former cases." (citing *United States v. Rice,* supra, and *Crook v. United States,* 270 U.S. 4, 46 S. Ct. 184, 70 L. Ed. 438) "there are several contract provisions which showed that the parties not only anticipated that the Government might not finish its work as originally planned, but also provided in advance to protect the contractor from the consequences of such governmental delay, should it occur. The contract reserved a governmental right to make changes in the work which might cause interruption and delay, required respondent to coordinate his work with the other work being done on the site . . ."

Recent decisions of the Court of Claims follow these decisions:

Commerce International Company, Inc. v. United States, (1964), 338 F. 2d 81, 85:

> "It is settled, of course, that mere delay, per se, incident to the government's making work or material available to a contractor is not compensable, in a claim for breach of contract, without a specific warranty . . . Absent a warranty the contractor's recourse for mere delay is to seek an extension of the time of his performance."

Laburnum Construction Corp. v. United States, (1963) 325 F. 2d 451, 457: "Plaintiff would have no right to complain if the defendant's exercise of its reserved right to make changes set its work schedule awry." Citing *J. A. Ross & Co. v. United States,* 115 F. Supp. 187, 126 Ct. of Claims 323.

Gilbane Building Company v. United States, (1964) 333 F. 2d 867, 869:

> "The issue then is, whether defendant is liable for Raymond's delay even though it did not wrongfully cause it. Such liability, if it exists at all, must be found in the express language of the contract; it cannot arise solely by implication."

This case contains an excellent discussion and analysis of the law and contract provisions similar to ours.

All of these decisions involving the general and the government are just as applicable where the parties are the general and a sub. But for a recent decision involving the latter see *Southern Fireproofing Company v. R. F. Ball Constructing Company, Inc.* (1964), 334 F. 2d 122. In that decision the court found that plaintiff subcontractor could not recover for delay unless expressly provided in the con-

tract and then only if it was the fault of the defendant contractor. The decision further holds that the contract documents under examination almost exactly the same as ours contained no time guarantee.

Of course, the fact that the defendant cannot recover from the United States for the delays caused by the government's change orders has been fully determined and exhausted in the administrative proceedings to which plaintiff refers in his brief.

We have presented the foregoing at some length for the reason that the defendant's next position is that the plaintiff is bound by these provisions of the general contract and the applicable law as well as defendant.

Plaintiff contends the provisions incorporating the general contract into the sub are vague. (Page 17 of plaintiff's brief.) Yet, on page 2 of his statement of facts he says: "The subcontract was expressly made subject to the main contract." We submit that in this regard it would be difficult to draft language which is more clear or comprehensive. The very first language in the subcontract, Exhibit 2 and T. 5, is:

> "THIS AGREEMENT made this 30th day of March, 1956, by and between ASHTON-MARDIAN COMPANY, hereinafter called the Contractor, and McDaniel Plumbing & Heating Company, hereinafter called the Sub-Contractor,
>
> WITNESSETH:
>
> That the Contractor and the Sub-Contractor for the consideration hereinafter named, agree as follows:
>
> "Section 1. The Sub-Contractor agrees to furnish all labor, material, equipment and tools to perform all work as described below, in accordance with the *general conditions of the Contract* (which is available for inspection at all times at the office of the Contractor) *by the Owner and the Contractor* and in accordance

with the drawings and specifications prepared by Corps of Engineers, U. S. Army, hereinafter called the Architect-Engineer, *all of which general conditions,* drawings and specifications signed by the parties thereto are identified by the Architect-Engineer and *form a part of the Contract between the Contractor and the Owner,* dated March 30, 1956, *and hereby becomes a part of this Contract* for AIR FORCE STATION TM-181 at AJO, ARIZONA, for Corps of Engineers, U. S. Army, hereinafter called the Owner:" (Emphasis added.)

In addition, the Court is respectfully referred to the other provisions quoted at length on pages 10-12 of plaintiff's brief. Also, Section 4, Exhibit 2, provides:

"Section 4. The Contractor and Sub-Contractor agree to be bound by the terms of the Agreement, general conditions, drawings, and specifications as far as applicable to this Sub-Contract and also by the terms and conditions as set forth on the reverse side entitled 'Terms and Conditions,' which are specifically incorporated herein and made a part hereof." (T. 5)

That a general contract may be made a part of the subcontract by such provisions is determined in the case of *Mount Vernon Contracting Corp. v. United States,* 153 F. Supp. 469 (1957). Also see *C. A. Hooper Co. v. United States,* supra, and *Cliffe Co. v. DuPont Engineering Co.,* 298 Fed. 649. This language appears at page 651 of the latter decision:

"Where a subcontractor undertakes to work according to the original contract with the owner, the two contracts form, in effect, but one contract, and the subcontractor is entitled to the same benefits and bound by the same conditions as the contractor under the original contract . . ."

Also see *Lanehart v. United Enterprises,* 226 F. 2d 359.

Therefore, by the terms of his agreement as expressed in the subcontract, the plaintiff agreed that the government should have the right to make changes by virtue of either clause 3 or clause 4, the latter arising on account of changed conditions, and that if he were delayed by reason thereof he would not be entitled to any damages. This was a part of his bargain and it must be presumed that he received consideration therefor as a part of the benefits conferred upon him in the subcontract. *Chotean v. United States,* supra.

The defendant's next point is that the subcontract itself precludes plaintiff's recovery for delay damages. Again, each of the preceding arguments apply to some extent in this argument. It is difficult, for example, to read the subcontract without reference to the provisions of the general contract. However, the subcontract does contain these additional provisions. Exhibit 2, Terms and Conditions, page 2, paragraph 1:

> "The contractor, at any time before completion and final acceptance of the work may order any changes or alterations in the work required to be performed by the subcontractor."

Paragraph 6 of the same:

> "The subcontractor agrees to fully do and perform this work and in all things execute and complete this contract within the time herein limited for that purpose *or within said term as it may be extended by reason of delay, changes, additions, or other reasons called for or allowed by the contractor and architect and/or engineer . . .*" (Emphasis supplied.)

and paragraph 8:

> "It is the responsibility of the subcontractor to follow the progress of the job."

Paragraph 16, as set forth at length in plaintiff's brief, page 11, contains additional language to the same effect.

Many of the foregoing decisions state as a general principle of law that where parties provide for changes, additions, etc., in their contract that they have also recognized that delays will result and have by reason of their contract agreement precluded themselves from recovery of damages resulting from such delays and waive the same. *United States v. Rice,* supra. *Crook v. United States,* supra. *United States v. Foley,* supra. *Choteau v. United States,* supra. *Brooker Engineering Company v. Grand River Dam Authority,* supra.

In his brief, plaintiff refers the court to *Lichter v. Mellon-Stuart Company,* 193 F. Supp. 216. But this case says at page 220:

> "The controlling principle of law seems to be that absent contractual provisions to the contrary, the contractor is *not liable* to reimburse the subcontractor for the latter's increased costs caused by delays contemplated in the contract, but the contractor is liable in damages when any delay caused by the contractor constitutes a breach of the contract express or implied." (Emphasis added.)

The court holds it was not a breach for the general contractor to direct the sub to do the work as it became available, the contract providing the sub's work should be performed "as required by the progress of the work and as directed by the contractor." (Page 221) The provisions considered by the court in refusing claimant's claim for delay damages were identical for all practical purposes with those in the instant case. The court does award damages with reference to one claim but only where it concludes that the contractor's breach was responsible for the delay.

Defendant turns to another point. The plaintiff's general proposition of law assumes a situation where it has been agreed between the parties that the subcontractor will be able to complete his work within a specified period of time. Although it was contemplated that the work provided in the original contract would take approximately 450 days, this did not constitute a guarantee that the work would not actually be performed over a longer period of time. As has been noted, the contract documents expressly provide for delays. Time is not made of the essence of either contract and time is not generally of the essence in a building contract. The defendant did not warrant or guarantee to the plaintiff that he would be able to complete his subcontract within 450 days. Volume 3A, Corbin on Contracts, 377, Section 720:

> "Construction contracts are subject to many delays for enumerable reasons, the blame for which may be difficult to affix . . . Delays are generally foreseen as probable; and the risks thereof are discounted . . . The complexities of the work, the difficulties commonly encountered, the custom of men in such cases, all these lead to the result that performance at the agreed time by the contractor is not of the essence."

We believe it may also be argued that plaintiff and defendant both knew, or should have known, that it was more probable than not that the government would want many changes in the performance of the contract during its progress. Naturally some of these changes would cause delay. Naturally they would not all require additional plumbing. If defendant was not willing to undertake the risk of damages resulting from such delay, he should not have undertaken the subcontract. He should not now be heard to complain that he did not appreciate these facts of life at

the time he obligated himself to do the work. *Choteau v. United States,* supra.

Plaintiff argues in his brief that the subcontract should be interpreted to make sense; that the question of whether the plaintiff may recover for delay depends upon the reasonable expectations of the parties; that a contract should be given a fair interpretation. We of course agree with these suggestions. We disagree, however, with plaintiff's conclusion. The first contract is between the defendant and the government. It expressly provides that the time required for performance of the contract may be extended for changes and that no delay damages shall result therefrom. Faced with this provision in the general contract, the only logical procedure for the defendant was to protect itself against this possibility in their subcontract. Otherwise, a situation would result whereby the government could , as it did in this case, order changes which lengthened the time of performance and the defendant could recover nothing for any damages occassioned by such delay and yet would be liable to each and every subcontractor whose work was delayed for the completion of said changes. The subcontractor is in no different position from what it would have been in as a separate prime contractor. *Mount Vernon Contracting Corp. v. United States,* supra.

Defendant believes that the argument of plaintiff appearing on pages 16 and 17 of his brief is more persuasive of this conclusion than that reached by the plaintiff. Anyone who has engaged in the construction business to any significant extent knows that changes are more often than not made during the progress of the work; that such changes necessarily in most instances result in delay of performance. The plaintiff not only should have realized this in the instant case but was made aware of it in the provisions

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United States Court of Appeals

For the Ninth Circuit

DAVID S. McDANIEL, doing business as McDaniel Plumbing & Heating Company,
Appellant,

vs.

ASHTON-MARDIAN COMPANY (Joint Venture), and TRAVELERS INDEMNITY COMPANY, a corporation,
Appellee.

Appellant's Brief

JURISDICTION

This is a Miller Act claim, 40 U.S.C. Sec. 270b, by a subcontractor against a general contractor and its bonding company. The question of liability was presented on cross motions for summary judgment by the parties. Judgment for defendant was entered on April 1, 1965, (T. 37) and this appeal followed on April 5, 1965 (T. 38) with appropriate bond (T. 39).

STATEMENT OF FACTS

This case arises in consequence of the construction of a Defense Department project known as the Ajo Air Force

Station. The general contractor on that project was the Ashton-Mardian Company, a joint venture, which was duly bonded by the Travelers Indemnity Company, the other defendant here. The contract of Ashton-Mardian with the Government, Exhibit 1 here, provided that the work was to be finished in accordance with paragraph SC-1 of the specifications. It is stipulated by the parties that the work was contemplated to take 450 days.* It is also stipulated that in actual fact the work took 196 days longer than was contemplated at the time of the execution of the contract.

This contract was executed on March 30, 1956. On that same day, Ashton-Mardian Company executed a contract with plaintiff, a subcontractor, to do the plumbing and heating work on this job. See Exhibit 2. While the main contract, Exhibit 1, with its attachments, runs many volumes, the contract between the defendant Ashton-Mardian Company and the plaintiff, is a simple document which provided that plaintiff was to receive some $400,000 for work in accordance with the plans and specifications. The subcontract was expressly made subject to the main contract and also to certain "terms and conditions" set forth on the back of the subcontract.

The 196 days extra time spent on the job was caused either by (a) a poor survey resulting in a protracted delay in finishing the main access road; or (b) by change orders. The relevance of each of these to the matter at hand will be considered more fully below. In form, at least, the delays

*To avoid burdening the records, we have not submitted the bulky three volume specifications. These include a requirement that the general contractor will "complete the work within 450 calendar days after the receipt of notice to proceed."

are due principally to Change Orders 4 and 5 which added certain "Arctic Towers" to the job.* Change Orders 4 and 5 covered 182 days of the 196 day contract extension.† Change Order No. 30 was for 14 days. It involves a minor matter with no bearing here.

We note only to put it aside that there were other change orders—there were a total of thirty-nine—and that some of those other change orders did involve plaintiff. They added a sufficient sum that its final contract was for about $462,000. But what is essential to this case is that those changes which did affect plaintiff did not in any way affect the *time* of the job. These changes principally simply changed the size of pipe which was being used but did not materially affect the time required for its installation.‡

Plaintiff received no economic benefit from any of the orders which extended the time of the contract. If the delay is attributed to the necessity of building a road and obtaining additional borrow for the purpose, the general contractor, defendant here, was paid a considerable amount per yard for all additional borrow, of which there was much; but none of this was plumber's work. If the delay is attributed to the change orders, none of these change orders involved the plaintiff. In all of Change Orders 4, 5 and 38 put together, there is only one allowance of any payment

*Arctic Towers are structures used in the operation of radar which were first developed in the far North; hence the observation in the opinion of the Armed Services Board of Contract Appeals that they were "something of an incongruity in Arizona."

†See Corps of Engineers Board of Contract Appeals Opinion, p. 6. The opinions will hereafter be referred to as the Engineers' Opinion for that just cited and the Armed Services Opinion for the final appeal opinion.

‡Plaintiff has released the actual exhibits for filing in the Court in Tucson, and therefore does not have the numbers available.

of any amount to plaintiff, and this was for less than $300. Arctic Towers don't take plumbing.

It is also stipulated that the plaintiff was at all times up to his own proper schedule under the original contract. It is stipulated that "the matter shall be submitted on this issue of liability as a situation where plaintiff did not, itself, cause any part of the delay period." As the Engineers' Opinion correctly summarizes, up to April 1, 1957, when the defendant altered the schedule of the work, "The McDaniel Company was on schedule at all times. And in fact, as of 1 April 1957, the subcontract was in a status 79.8% complete on the basis of progress payments; whereas the over-all prime contract was only an approximate 54% complete at the same time."

The consequence of the delays in the work and specifically of the change orders was that the plaintiff was kept on the job for substantially the entirety of the 196 extra days in order to be able to get to work and finish his part in it which otherwise, so far as he was concerned, could have been completed under the original contract.

It was unnecessary for the Defense Department Boards to determine precisely how long plaintiff had been delayed, but the Engineers Board found that, "On the whole factual record, however, we can and do determine that revisions on the Arctic Tower foundations caused necessary carry-over of some substantial part of the subcontract work, i.e. certainly more than a portion *de minimis*."*

The result is that the delay caused the plaintiff damage, the precise amount of which need not be specified here since the only issue presently before the Court is liability. But obviously there is some damage—as the Engineers Board held, it is clearly more than *de minimis*. Keeping men on

*Engineers Opinion, p. 13.

the job for a protracted additional time, keeping rented equipment available, carrying overhead, and many other elements result in a loss to plaintiff from the delay.

The Proceedings Before the Defense Department.

This action was duly filed in the federal district court to compensate plaintiff for the delay. The defense rejoined that the disputes clause of the contract between it and the Government was incorporated by reference in the subcontract and that therefore the disputes clause would have to be followed. This clause appears at page 2a of Exhibit 1. The net effect is that "any dispute concerning a question of fact arising under this contract" should go through the Defense Department appellate procedures. Any such determination is there declared to "be final and conclusive upon the parties hereto."

The practice in matters of this sort is that a general contractor may make a claim against the Government. He may do so in fact for the benefit of subcontractors, although at no point do the subcontractors become parties before the Government agency and at no point does the Government recognize any obligation to them. That procedure was followed here. Plaintiff's counsel here appeared in the name of the defendant Ashton-Mardian Company before the Contracting Officer in Los Angeles, before an intermediate appeals process at San Francisco, before the Engineers Board of Contract Appeals in a hearing in Phoenix, and finally before the Armed Services Board of Contract Appeals in Washington.*

*Only its irrelevancy here causes plaintiff to abstain from commenting with pen dipped in vitriol on the barbaric procedure described in the text. If the Defense Department were just one half as brutal with our foreign enemies as it is with our domestic friends, the Cold War would have been over long since.

It would be needlessly tedious to narrate all of the intermediate steps and decisions. The findings of the Contracting Officer of November 20, 1958, are here as Exhibit 3. His supplemental findings of September 4, 1959, are here as Exhibit 4. The decision of the Engineers Board is here as Exhibit 9, and the decision of the Armed Services Board, along with its denial of rehearing, are here as Exhibits 16 and 17. Suffice it to say that if this was a remedy to be exhausted, it has been exhausted with rare thoroughness. The essential elements of the last two opinions are these:

(1) *Engineers Board.* This is a twenty page document. The decision portion runs from pages 17 to 20 and holds first, that, without condoning deficiencies in the survey which led to the road delay, the road condition "had no substantial effect upon the subcontractor's access or consequentially upon the subject matter of this appeal."

The delays therefore had to be attributed to the change orders only. So far as Change Order No. 4 was concerned, Ashton-Mardian, defendant here, having accepted it, was "estopped from assertion that such changes go beyond the scope of the contract." So far as Change Order No. 5 is concerned, this Board held that the Government was not unreasonable in the length of time which it took to make this change, which proved necessary because of unexpected rock conditions and that therefore the general contractor was barred from recovery under *United States v. Rice,* 317 U.S. 61, 63 Sup.Ct. 120, 87 L.Ed. 53 (1942).

(2) *Armed Services.* The opinion of the final board, Exhibit 16 here, after stating the facts reaches its decision at page 5. This Board affirmed that the "completion status of the road did not delay access to the building areas." It found that the case therefore was under the rule that "the Government is obligated to compensate the contractor only

for the direct cost of performing the change or overcoming the changed condition but not, except in the form of a time extension, for the delay effect the added or increased work may have on the remainder of the work which is unchanged." It held that this case was not within any exception to that rule. It affirmed that the general contractor by accepting the basic Change No. 4 adding the Arctic Tower to the contract estopped itself from contending that any such change was beyond the scope of the contract. Hence it held, following the *Rice* case, *supra*, that the Government was responsible to the general contractor only for the direct costs of the additional work and not for any delay damages.

Proceedings in the Court Below.

Upon what was indeed exhaustion of the administrative remedy, the matter was presented to the court below. To avoid duplication, it was stipulated that the issue of liability only should be presented on cross motions, and that the Defense Department record should be bodily imported.

This was done by stipulation (T. 26-29). At the risk of duplication, we reproduce what are factually the principal paragraphs:

> 4. "The plaintiff entered into a subcontract with the Ashton-Mardian Company, a copy of which is attached hereto as Exhibit 2.
>
> 5. "By virtue of the prime contract, it was contemplated that the work in question would take approximately 450 days. In actual fact, the work took 196 days longer than was contemplated at the time of the execution of the contract.
>
> 6. "The added 196 days, hereafter called the delay period, was the product in part of Government change orders to the Ashton-Mardian Company and in part of other circumstances which need not be specified here.

There were a total of thirty-nine such written change orders, three of which contained the time extensions. They are attached hereto as Exhibit 18. The plaintiff did not receive any increases in the amount of his subcontract by reason of the changes required by these three orders, excepting only $242.00 on Change Order No. 4. This matter shall be submitted on this issue of liability as a situation where as to at least a part of the delay period the plaintiff received no economic benefit therefrom. However, these facts shall be without prejudice to the defendant's claim and right to show on the issue of damages the following matters, each of which the plaintiff denies: (a) That plaintiff did, in fact, receive economic benefit from changes which required additional time for performance, other than those which contained time extensions, and (b) That not all of the time extensions were for the performance of the three change orders in which they were contained, additional time being needed for some of the other change orders and the need for time extensions being accumulated and granted on the three specific orders.

7. "The plaintiff was substantially on schedule in his work and completed it within the total time required for performance, including the additional 196 days. The practical effect of the delay period was that plaintiff performed its work including the additional work required under its change orders over a substantially longer period of time than was originally contemplated for the initial work. As has been noted above, it is agreed that this delay, if it is in law compensable, may have caused some damage to plaintiff, but there is no stipulation whatsoever as to the amount, this question being reserved. In any event, the matter shall be submitted on this issue of liability as a situation where plaintiff did not, itself, cause any part of the delay period."

The trial court gave judgment for the defendants with a brief decision (T. 32) as follows:

"The subcontract between the parties (Exhibit No. 2) does not expressly provide, or imply, that use-plaintiff would be able to complete its work under the subcontract within 450 days. In fact, it states that: 'The Sub-Contractor agrees to perform the work progressively as directed by the Contractor and complete the entire project In accordance with Plans and Specifications and as directed by Contractor'. The provision can mean only that defendants are accorded the right to direct and control the time and manner of doing the work covered by the subcontract.

"Further, Paragraph 16 of the Terms and Conditions of the subcontract rendered applicable to use-plaintiff the terms of the General Contract between defendants and the United States (Exhibit No. 1); and Section 3 of the General Provisions of that Contract gave the United States the right to make changes within the general scope of the Contract without being obligated to defendants for any delay damages or for anything other than the direct costs of the additional work and equitable time extensions for any additional time required for performance of the changes.

"These provisions of the subcontract and the General Contract make it clear that both use-plaintiff and defendants knew when they entered into the subcontract that it could very well happen that the work under the subcontract would not be completed within the 450 days specified in the General Contract; that changes might be made by the United States which would necessarily extend the performance period of the General Contract and, consequently, the performance period of the subcontract. Both use-plaintiff and defendants knew, also, that if any changes authorized by Section 3 and ordered by the United States should result in delay damages to defendants, no compensation for such dam-

ages could be recovered by defendants from the United States. Hence, it is reasonable to conclude that use-plaintiff and defendants did not intend their subcontract to mean that use-plaintiff could recover damages from defendants for delays occasioned by proper change orders of the United States.

"Use-plaintiff was delayed to some extent in completing the work covered by its subcontract, but the delay was not caused by any wrongful act or default of defendants. Such delay resulted entirely from changes ordered by the United States in Change Orders Nos. 4 and 5 (Exhibit No. 18); and each of these orders was one which the United States had a right to make and which defendants were required to carry out under the terms of Section 3, the United States being required only, as it actually did, to compensate defendants for the direct costs of the additional work and to extend the time for completing the General Contract for a period commensurate with the time required for the performance of the changes. The changes required by the United States involved no 'cardinal changes'."

This appeal followed; see the Jurisdictional statement for details.

CONTRACT PROVISIONS

Possibly relevant provisions of the subcontract, Exhibit 2, are paragraphs 2, 6 and 16 of the Terms and Conditions. These are as follows:

"6. The Sub-Contractor agrees to fully do and perform this work and in all things execute and complete this contract within the time herein limited for that purpose or within said term as it may be extended by reason of delay, changes, additions, or other reasons called for or allowed by the Contractor and Architect and/or Engineer, and should the Sub-Contractor fail to complete the work or deliver the materials within

the time agreed upon, the Sub-Contractor agrees to pay and will pay to the Contractor for each and every day of such delay beyond the time of completion of work or delivery of materials as herein defined, the sum of $..... in either case which sum is hereby fixed, in view of the difficulty of estimating such delay, agreed upon, and determined by the parties hereto as the liquidated damages that the Contractor will suffer by such default and not by way of penalty and shall be deducted as such from the balance due the Sub-Contractor. Should the damages exceed the sum due or to become due, the Sub-Contractor then, and in that event, shall be liable to the Contractor for such difference."

"16. Insofar as the same are applicable to the work covered in this Contract, the Sub-Contractor agrees to be bound to the Contractor by the terms of the General Contract between the Contractor and the Owner and the specifications in connection therewith and to assume toward the Contractor all obligations and responsibilities the Contractor by these documents assumes towards the Owner. In particular, but without limitation, the Sub-Contractor agrees: (1) That the determination of any disputed question made pursuant to the provision of the General Contract and the general conditions, drawings, and specifications in connection therewith shall be binding upon the Sub-Contractor; and (2) the provisions of the General Contract with respect to the termination of the General Contract shall be applied to this Sub-Contract and shall be binding upon the Sub-Contractor; and (3) that in all respects the relationships of the Contractor and the Sub-Contractor are to be governed by the plans and specifications named above, by the agreement, and the general conditions of the General Contract so far as is applicable to the work thus sub-let."

In addition to the foregoing, Section 2 of the contract is as follows:

"The Sub-Contractor agrees to perform the work progressively as directed by the Contractor and complete the entire project In accordance with Plans and Specifications and as directed by the Contractor."

QUESTIONS PRESENTED

1. If a subcontractor agrees to do work for a general contractor within a fixed period of time, and is thereafter required to extend his services for a much longer time at loss to himself and without his own consent or benefit, is he entitled to recovery for the delay?

2. If the foregoing question may be answered in the affirmative as a general principle, is there anything in this contract, or on these facts, to take this case out of the general rule?

SUMMARY OF ARGUMENT

It is a fixed and well-established principle of the law of building contracts that a subcontractor is entitled to recover from a general contractor for job delays which are not caused by the subcontractor. This right extends to the subcontractor unless he has waived it. In the instant case, there were indisputably delays and equally indisputably they were not caused by the subcontractor. It follows that he is entitled to recovery unless something in the contract documents operates as a waiver of his right in this regard.

There is no such waiver here. The contract contemplates that the work is to be done in a 450 day period. There were provisions by which the Government might enlarge or alter the job and extend the time therefor, but no provisions by which it could do so without compensation. Certainly there is nothing in the contract by which the subcontractor can be held to have agreed that he would hold himself immobile, doing nothing but run up costs, have over half a year with-

out compensation. The general rule applies and he should recover.

ARGUMENT

I. Any Contractor Delayed in His Work by Action of the Other Contracting Party Is Entitled to Damages Therefor.

We assume that there will be no serious issue on the general proposition that if a person contracts to do a job with the reasonable expectation that it will be done within a particular period of time, and if he is delayed in doing it through no fault of his own but by virtue of the act of the other contracting party, he is entitled to damages.

> "The building contractor's claim for damages may be based in part on losses due to the owner's causing unreasonable delay in completion. The contractor's machinery and labor force may have been kept idle, when but for the delay they would have been income producing. In such case these losses must be estimated. It is proper to admit expert testimony as to the rental value of machinery, the extra amounts paid to hold the labor force together, and also a reasonable proportion of overhead costs fairly chargeable to this job during the delay." 5 *Corbin on Contracts* 429.

The general right of the contractor to recover damages for delay not caused by him is well established.

> "In calculating damages to a contractor, when without his fault the other party, during the progress of the work, delays it, the object is to indemnify him for the losses sustained and gains prevented by the action of the party at fault, viewing these elements in relation to each other. . . . The measure of damages for delay in the performance of a construction contract is the actual loss sustained by reason thereof. . . ." *Grand Trunk Western R. Co. v. H. W. Nelson Co.,* 116 F.2d 823, 827 (6th Cir. 1941).

The general rules are well stated in an Oregon opinion which has been adopted by the Ninth Circuit in *Northeast Clackamas C. E. Co-op v. Continental Cas. Co.,* 221 F.2d 329, 335 (9th Cir. 1955):

> "It is the rule that in carrying out a contract, whether time is of the essence or not, the owner cannot delay or retard the contractor in the progress of the work or prevent performance thereof without liability; and, where the owner under the contract is bound to furnish materials or to do any other thing required to be done by him pursuant to the contract, he must do that thing in such a way as not to retard the contractor; and, if through the act or omission of the owner under such circumstances the work is delayed in such a way as to make performance impossible, the contractor can recover upon the quantum meruit."

For another statement of the rule, see *Frank T. Hickey, Inc. v. Los Angeles Jewish Com. Coun.,* 276 P.2d 52, 59 (Cal.App. 1954) as follows:

> "Ordinarily, as between a subcontractor and the contractor who is in control of the work being performed, the law places the latter under an obligation to make good all losses consequent on delays in the progress of the work not attributable to the subcontractor."

The passage just quoted exactly and precisely fits this case.*

II. The Trial Court Erroneously Failed to Apply the General Rule.

The foregoing cases establish the general rule that as by the subcontractor and contractor, the contractor must bear the responsibility for delays not occasioned by the sub-

*For the most comprehensive collection of cases on the general subject we have seen, see the annotation at 91 L.Ed. 48.

contractor. As had been said, "Ordinarily, a general contractor is liable to a subcontractor for damages resulting from delays not attributable to the latter." *Lichter v. Mellon-Stuart Co.*, 193 F.Supp. 216, 221 (W.D.Pa. 1961). Aff'd., 305 F.2d 216 (3d Cir. 1962). The question then becomes whether anything in these particular contract documents amounts to a waiver by the plaintiff of the protection of the general rule.

The substance of the trial court opinion is that McDaniel signed a contract by which Ashton-Mardian has "right to direct and control the time and manner of doing the work covered by the subcontract." The Government could extend the general contractor's time *by paying for it* in the form of change orders. Therefore—so runs the argument—the general contractor could extend the time of the subcontractor *without paying for it.* A certain *non sequitur* here will be noticed. As a matter of contract construction, the trial court concluded that these parties "did not intend their subcontract to mean that [McDaniel] could recover damages from defendants for delays occasioned by proper change orders of the United States."

1. Ashton-Mardian was kept on the job for 196 extra days in connection with the three change orders. It was fully compensated for this 196 days by being paid for its added work. But McDaniel was simply kept in a state of suspended animation. He gets nothing while Ashton-Mardian receives full compensation.

It is immaterial that this is a consequence of change orders. Of course it was, but Ashton-Mardian accepted the change orders. It is therefore estopped from complaining about it. Hence the Armed Services opinion rests flatly upon the estoppel of Ashton-Mardian. See particularly the text at page 7 and note the reliance on *Silberblatt & Lasker, Inc.*

v. United States, 101 C. Cls. 54 (1944) which has been cited at every stage of the appeal. The substance of this decision is that where a general contractor acquiesces in a change order, he will not be heard to complain about it. As this is restated in the Armed Services opinion, "The contractor's affirmative acceptance and performance of the change dooms any contention it might now put forward in that regard."

What the defendant says here is that because Ashton-Mardian saw fit to accept the change which was profitable as to it, McDaniel is bound by that acceptance and is to be paid nothing. If this were in the contract, the contract would indeed be a blank check.

We press this point: The essential position of the defendant is that by virtue of these contract documents, McDaniel gave Ashton-Mardian the right to keep McDaniel on the job for so long as happened to suit the pleasure of Ashton-Mardian and the Government; and this without fault or compensation for McDaniel. This is an exceedingly improbable contract interpretation. "It is quite possible for two parties to make a valid contract that seems unfair or unreasonable or even absurd to other people. If, however, the words of agreement can be interpreted so that the contract will be fair and reasonable, the court will prefer that interpretation. Although at times the only reasonable interpretation may show that an unreasonable contract has been made, the unreasonableness of the result tends to make some other interpretation a reasonable one. It is possible for a party to overreach himself and defeat his own ends by the use of long printed forms containing complicated provisions for his own advantage and none for the other party." 3 *Corbin on Contracts,* 210-211.

Where possible, a contract will be interpreted to be reasonable, fair, and just. *Aronson v. Arkelian, Inc.*, 154 F.2d 231 (7th Cir., 1947); *Kenyon v. Automatic Instrument Co.*, 160 F.2d 878 (6th Cir. 1947). If this contract means what the defendant asserts, a man would be a plain boob to sign it; and yet where possible, a contract will be interpreted to be an agreement such as prudent men would naturally enter into. *Liberty Nat. Bank v. Bank of America*, 218 F.2d 831 (10th Cir., 1955).

2. Approaching its contract in a spirit of interpreting it to make sense, there is nothing in it by which McDaniel gave Ashton-Mardian any such blank check.

(a) The subcontractor signed a typical brief document which is vaguely said to be subject to the main contract. The main contract provided that the work was contemplated to take 450 days.* While the main contract provided for change orders, it of course does not provide that anyone within its terms is to work for nothing.

(b) Plaintiff has no contract with the Government. He sues on a contract with Ashton-Mardian. The trial court refers to Section 2 of this contract which provides that "the Sub-Contractor agrees to perform the work progressively as directed by the Contractor and complete the entire project In accordance with Plans and Specifications and as directed by Contractor." This, as the trial court says, "can mean *only* that defendants are accorded the right to direct and control the time and manner of doing the work covered by the subcontract." [Emphasis added.]

Quite so; it means this, and "only" this. Certainly nothing in that language operates as a waiver of the right to be paid if the work is spread over a period in excess of the contemplated time.

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*Paragraph 5 of the stipulation of the parties (T. 27) provides that "by virtue of the prime contract, it was contemplated that the work in question would take approximately 450 days."

The only other control provisions relied upon by the trial court are the provisions showing that the Government could make change orders of the general, and that if they made such change order, it would pay only for the direct costs and would make equitable time extensions. Assuming this to be true, this is a direct provision that in case the job is extended by virtue of change orders, the general will be paid for the changes. Yet McDaniel is paid nothing for the very same changes on which he loses and the general has a substantial gain.

The trial court concludes that "it is reasonable to conclude" that plaintiff and defendant "did not intend their subcontract to mean that [McDaniel] could recover damages from defendants for delays occasioned by proper change orders of the United States." We agree that in the ambiguous cases, the question of whether the plaintiff may recover for delay depends upon "the reasonable expectations" of the parties. *Johnson v. Fenestra, Inc.*, 305 F.2d 179, 181 (3d Cir. 1962). It is of course the heart and soul of our argument that few things could be more unreasonable than the intent attributed here.

Of course a subcontractor can make an express agreement to waive delay claims. In *Sammons-Robertson Co. v. Massman Const. Co.*, 156 F.2d 53 (10th Cir., 1946), the prime contractor was doing work for a federal agency. The possibility of delay because of clouded land title was expressly recognized, and the subcontract in so many words provided that the sub should have no delay damages if it took unexpected time to clear title. Even a no-damage clause will not be applied if the delay is unreasonable, *Northeast Clackamas C.E. Co-op v. Continental Cas. Co., supra.*

But we do not reach such refinements here because in this contract between McDaniel and Ashton-Mardian

(drafted by Ashton-Mardian with all the consequences as to construction which this entails), there is no clause purporting to cut off McDaniel's rights as to delay. The case is covered by *Studer v. Rasmussen,* 344 P.2d 990 (Wyo., 1959), in which a subcontractor sued a prime who in turn had a federal government contract. The sub was delayed for 90 days and sued for damages. The defense relied upon the *Rice* and *Foley* cases. The court held the subcontractor entitled to delay damages; it expressly rejected any contention that the sub waived its rights by continuing with the work. The decision is a compendious review of the authorities and the issues, and solidly supports the right of the plaintiff to recover here.

CONCLUSION

McDaniel agreed to do a job for defendant in 450 days. He was ready, willing, and able to do it. By virtue of agreements between the defendant and the Government, agreements which were lucrative to the defendant but barren to McDaniel, he was kept on the job for six extra months. Defendant may have been able to keep McDaniel on the job, but not without paying for it. The defendant should be found liable for the delay.

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Attorneys for Appellant

July, 1965

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN P. FRANK

(Appendix Follows)

Appendix

All exhibits in this case were received under one stipulation, and the list of exhibits and the stipulation are set forth at T. 26-29, the list being on page 29. The list is as follows:

1. Basic Contract Between Parties (Exhibit 1)
2(a). Acceptance Letter of Government
2. Subcontract Between McDaniel and Ashton-Mardian
3. Denial and Findings of Contracting Officer of November 20, 1958
4. Supplemental Findings of September 4, 1959
5. Appeal to Claims and Appeals Board
6. Transcript of Hearing Before Board Member Campbell
7. List of Corrections in Transcript
8. Exhibits in the Matter Before Board Member Campbell
9. Decision of Board Member Campbell
10. Appeal by way of Complaint to Armed Services Board of Contract Appeals
11. Government's Answer to No. 10
12. Deposition of Esslinger
13. Affidavit or Deposition of Putnam
14. Affidavit of Esslinger
15. Miscellaneous Log Entries Utilized in Connection With Appeal
16. Opinion of Board of Contract Appeals
17. Opinion on Reconsideration
18. Thirty-nine Change Orders

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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JORGE HEDDERICH, JR.,	)	
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Plaintiff and Appellant,	)	
	)	CASE NO. 201
VS.	)	
	)	
EDGAR W. RICHARDS and UNITED STATES OF AMERICA	)	
	)	
	)	
Defendants and Appellees.	)	
	)	

APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JORGE HEDDERICH, JR.,	)	
	)	
Plaintiff and Appellant,	)	
	)	CASE NO. 2012
VS.	)	
	)	
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	)	
	)	
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	)	

APPELLANT'S OPENING BRIEF

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	)	
EDGAR W. RICHARDS and UNITED STATES OF AMERICA,	)	
	)	
Defendants and Appellees.	)	
	)	

APPELLANT'S OPENING BRIEF

This is an action on a promissory note. On or about June 6, 1957, in Los Angeles, California, the defendant, EDGAR W. RICHARDS, executed a negotiable promissory note for $21,875.00, payable to the order of RITA or HENRY ALBACHTON (ALBACHTEN). This note was to bear 6% simple interest and was all due and payable on June 6, 1961. The note was left with defendant, RICHARDS, at the

time of execution, but was delivered to the payee, HENRY ALBACHTEN in November or December of 1957.

Between the making and the delivery of the note the following events took place:

1. Assessments for Federal Income Taxes due in excess of the note were duly filed against HENRY ALBACHTEN and RITA ALBACHTEN in Ashland, Oregon, the then residence of tax payer (payee). These assessments were filed on July 26, 1957.

2. On or about July 30, 1957, by separate instrument in writing, in Guadalajara, Mexico, HENRY ALBACHTEN assigned all of his rights in the said note to plaintiff, the appellant herein, JORGE HEDDERICH, JR., in exchange for plaintiff's promise to furnish certain labor and material for development of a tract of land near Guadalajara, Mexico.

3. On or about September 30, 1957, defendant, RICHARDS, was served with a notice of levy. This levy was never released.

4. On or about September 16, 1957, plaintiff's promissory note was shown by defendant, RICHARDS, to an agent of the Internal Revenue Service, who declined to take the note.

Prior to these events and commencing in 1957, HENRY ALBACHTEN (tax payer) and plaintiff had discussed arrangements for electrical work on the tract in Chula Vista, Mexico, which ALBACHTEN was in process of developing. Plaintiff on or about July 30, 1957, agreed to furnish and supply approximately $20,000.00 worth of work and material to the project in exchange for the note with the understanding that ALBACHTEN was to pay for all other work, in cash. This latter agreement was entered into

on or about July 30, 1957. The work was done by plaintiff as agreed and the note was delivered to plaintiff on or about December 17, 1957, in Guadalajara, Mexico, after endorsement by HENRY ALBACHTEN.

Plaintiff had no knowledge of ALBACHTEN's tax problems, assessments, liens, etc. When defendant, RICHARDS, was notified in May of 1961, that the note had been negotiated to plaintiff, RICHARDS refused to pay it, because of the tax liens, claiming he did not know whether the note should be paid to the United States of America or to plaintiff. This action resulted.

The trial court found that the United States of America was entitled to priority and entered judgment in favor of the United States of America, and against plaintiff.

Plaintiff and appellant appeals on the following basis:

ARGUMENT

I

THE COURT ERRED IN ITS FINDING OF FACTS, IN FINDING THAT THE NOTE WHICH REPRESENTED THE OBLIGATION SUED UPON HAD BEEN FULLY PAID BY THE TRANSFEROR OF THE NOTE PRIOR TO THE LAW SUIT.

The Court in its Memorandum Opinion states that at the "time of the final delivery of the note to plaintiff, Chula Vista, (i. e., ALBACHTEN) owed very little" (Page 6, Lines 24 and 25 of Memorandum of Opinion).

This finding is followed on Page 4, Lines 5 and 6 of the Findings of Fact and Conclusions of Law.

Appellant contends that this finding is contrary to the evidence and is based upon a misunderstanding of the testimony of plaintiff, GEORGE HEDDERICH, JR.

The evidence shows that plaintiff and HENRY ALBACHTEN and/or CHULA VISTA entered into several agreements, all of which were in process at the same time. That except for the material and labor which was covered by the note, plaintiff's company, CASA ELECTRICA, was paid in cash. (Reporter's Transcript, Page 37, Lines 5 through 16).

The testimony that there was "very little owing" at the time of delivery of the note to plaintiff referred only to the agreements between the parties that were being paid for in cash. Any other interpretation of the evidence would result in the conclusion

that all of the contracts were being paid for in cash and that the delivery of the note was some form of bonus or gift.

The evidence clearly shows that considerable work was being done by plaintiff on this tract and it is clear that no payments were made on that part of the work for which the note was to be taken.

Therefore, the implied finding that plaintiff is not a holder in due course because "he had very little owing" is inaccurate and he should be considered as a holder in due course, without notice.

The Internal Revenue Code specifically provides that recording of the lien is not notice to a good faith purchaser of the instrument.

Internal Revenue Code Section 6323(c), Section 3672 (b), 1954.

II

THE JUDGMENT IS NOT IN KEEPING WITH THE FINDINGS IN ITS ADJUDICATION OF THE LEGAL RELATIONSHIP BETWEEN PLAINTIFF AND THE DEFENDANT RICHARDS.

The Memorandum and Order of the Court contains no decision relating to the determination of the obligation of defendant, RICHARDS, to plaintiff. The decision is for judgment for defendant United States of America with costs. (Memorandum and Order, Page 7, Lines 13 and 14).

In the Findings of Fact and Conclusions of Law (Page 6 Line 2) there is a conclusion that "plaintiff is entitled to no recovery on his claim".

Appellant contends that there are no findings to support this conclusion. The

plaintiff is either a holder in due course or he is an assignee of the note; in either case he is entitled to judgment against defendant, RICHARDS.

III

THE COURT ERRED IN ITS CONCLUSION THAT THE DEFENDANT UNITED STATES OF AMERICA WAS ENTITLED TO PRIORITY OVER THE PLAINTIFF HEREIN.

The evidence is undisputed that defendant, RICHARDS, gave a negotiable promissory note to ALBACHTEN. It is further undisputed that plaintiff is the holder of the note.

The burden of proof is upon those who deny that plaintiff is a holder in due course of the note, once it is established that the note

was duly assigned, executed and delivered and it is due and unpaid. See

Exchange Bank v. Veirs,
3 Cal App. 71; 84 Pac. 455.

See also

Calif. Civil Code Section 3107

Plaintiff therefore is either a holder in due course by virtue of the negotiation by endorsement of the instrument or he is an assignee of the instrument by virtue of a separate agreement entered into by ALBACHTEN and the appellant, wherein ALBACHTEN purported to transfer his interest in the note to appellant by a separate instrument, in writing, on July 30, 1957. In either event appellant, be he a holder in due course or an assignee for value, is entitled to recover the amount due under the note.

See

Loewy v Cherness
48 AFTR 1477

United States vs. Hartsell & Poor
1 AFTR 2d, 572

The defendant Hartsell borrowed money from the defendant Poor, who was his daughter, and executed two promissory notes. He also secured the notes with corporate stock. All of this was done while an assessment and lien was in effect.

The evidence showed that the daughter was apparently aware that the father was in tax difficulties and that he was delinquent in his taxes from 1944 to 1948. It was held there was insufficient evidence to prove that the daughter had knowledge or notice of the tax liens at the time the stock was pledged to her in 1952, even though the liens had been in existence for several years.

It was held further that the daughter was entitled to collect on the notes.

On appeal, in 3 AFTR 2d, 379; 261 F 2d, 593, it was held that the Government must establish knowledge of the lien by a preponderance of the evidence (which it had not done in this case).

IV

If plaintiff is a holder in due course, he clearly is entitled to priority over the United States tax lien, since 6323 (c) U. S. C. provides that as between a holder in due course of a negotiable instrument and the United States tax lien, the holder in due course shall prevail.

See Hartsell & Poor above

See Loewy vs Cherness above

See Plumb, Federal Tax Liens, at 194

"Even if the taxpayer still possessed the note or receipt at the time the levy is made on his debtor or bailor, absent something more, the latter may be subject to the prospect of

double liability because of the risk that the negotiable items may be subsequently negotiated."

Plumb, Federal Tax Liens, P. 47

The reason why securities are given special status was stated in:

H. R. Reports #855, 76th Congress, 1st Session, 56 (2) Cum. Bull., 504 523 (1939)

". . . it is inequitable for the statute that the filing of notice constitutes notice as regards securities . . . An attempt to enforce such liens on recorded notes would in many cases impair the negotiability of securities and seriously interfere with business transactions."

Only in the event that the taxpayer has actual notice of the lien, then the United States lien shall precede and have priority over the note. However, the holder of the note may still proceed to collection against the maker of

the instrument.

Citations: See above.

It is incumbent upon the United States Government to prove by the preonderance of the evidence that plaintiff had actual notice of the United States tax lien at the time the note was transferred to him.

See United States vs. Hartsell & Poor, above.

V

Should the evidence show that plaintiff is not a holder in due course, then even as an assignee of the instrument he should be entitled to priority over the United States Government lien. An assignee for value without notice of a United States tax lien shall be entitled to priority if the property assigned to him is taken in good faith and without notice of the lien.

Bureau of Controls -
Receivables vs U. S.
Cal 1958, 2 AFTR 2d at 5067

On August 23, 1957, an assessment was made against defendant Monmak for approximately $6,000.00, and was served on October 10, 1957. On October 15, 1957, the plaintiff sued Monmak for $1,500.00. On October 22, 1957, the defendant Parent became indebted to Monmak for the sum of $1,200.00. On October 23, 1957, Monmak assigned the debt of Parent to the plaintiff for a consideration. On November 8, 1957, a tax lien was filed and notice given to the defendant Parent. It was held that the assignee of an obligation is entitled to receive the assigned amount free of any Government lien.

Appellant contends that even if he were a mere assignee of a claim, since he took without notice of the Government lien, he is entitled to priority.

In any event, the assignee of the instrument

is entitled to collect the money due from the maker of the instrument.

See State Bank vs. Kinnett,
113 Kan. 360 214 P. 776

Stafford vs. Bored, 106 Okla,
173 233 P. 185

Watson vs. Goldstein, 17o Minn. 18
222 N. W. 509

Kent v Kent, 6 Cal. App. 2d, 488
44 P. 2d 445

Burkett vs. Doty, 32, Cal App. 337
162 P. 1042

Each case holds that the title to a promissory note may be transferred and assigned by a separate instrument in writing, and even orally, and in each case, the assignment prevailed as against general and/or attaching creditors.

VI

Plaintiff contends that the United States, by its failure to take possession of the negotiable note, having the opportunity and ability to do so,

either lost its lien as against the instrument, or is estopped to assert any priority, since by virtue of its conduct, it may have permitted a hardship or fraud to be worked upon the plaintiff.

That the United States Government has full authority and power to take possession of the note is apparent.

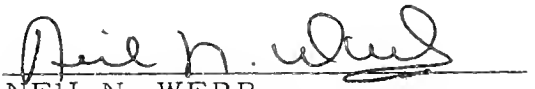
In Re: Timberline Lodge, Inc.
139 F. Sup., 13 (D.C. Ore, 1955)

Wherein it is implied that with respect to specific personal property, tax liens attach only when that property has been levied upon and seized to enforce the lien.

Appellant contends that since the Government was aware of the existence of the note, and since it had the opportunity and ability to take possession of it, or, mark it in some fashion, to prevent its negotiation, it is estopped to assert

a lien against the instrument, where to assert such right would cause damage to an innocent third party.

Respectfully submitted,



NEIL N. WERB
Attorney for Appellant

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 265 South Robertson Boulevard, Beverly Hills, California.

On November 26, 1965, I served the within

APPELLANT'S OPENING BRIEF

on the Appellees in said action by placing four (4) true copies thereof to each of the Appellees in a sealed envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California, addressed

as follows:

LOYAL E. KEIR
United States Attorney
Federal Building
Los Angeles, California 90012

LLOYD F. DUNN
Attorney at Law
1245 Glendon Avenue
Los Angeles, California 90024

Robert E. Beard

Subscribed and sworn to
before me this 26th day
of November, 1965

Lee DeJarnatt

Notary Public in and for said
County and State.
My Commission Expires
April 5, 1966.